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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 159.

CHARLES T. BARNEY, APPELLANT,

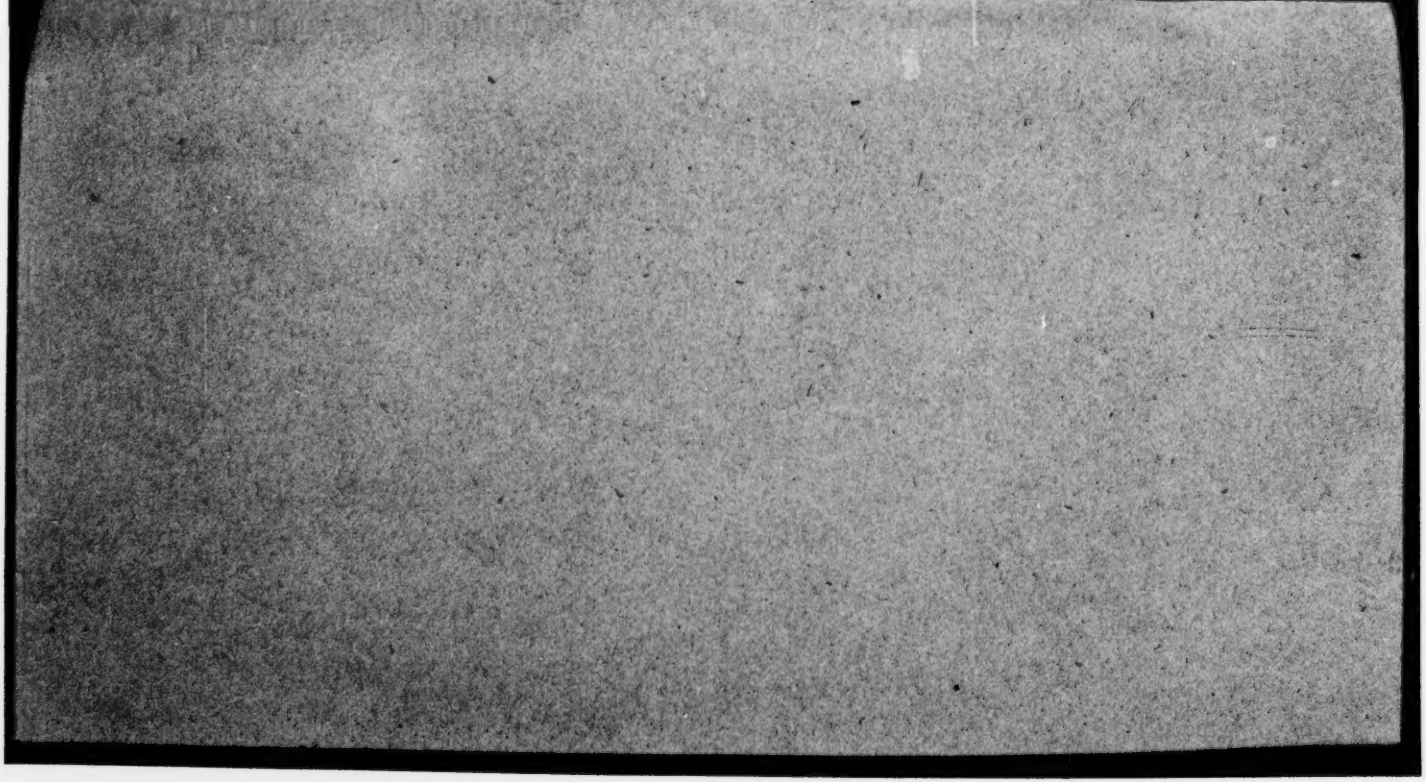
vs.

THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 12, 1902.

(13,734.)



(18,734.)

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1 The President of the United States of America to The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as commissioners of rapid transit; John B. McDonald, and May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, in equity, on the first Monday of October, A. D. 1902, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Charles T. Barney, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 25th day of August, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America, the one hundred and twenty-seventh.

JOHN A. SHIELDS, *Clerk.*

MASTEN & NICHOLS,
Solicitors for Complainant.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first
2 Monday of October, 1902, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

I hereby certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, The City of New York, by exhibiting to Charles V. Fornes, acting mayor of said city, the within original, and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, Board of Rapid Transit Railroad Commissioners for the City of New York, by exhibiting to Robert H. Hutchins, managing clerk for Parsons, Shepard & Ogden, attorneys for said board, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at city of New York, in my district, I served the within subpœna in equity

upon the within named defendant Seth Low, one of the commissioners of rapid transit, by exhibiting to Charles V. Fornes, who was acting mayor and who accepted service for said defendant, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant Edward M. Grout, one of
3 the commissioners of rapid transit, by exhibiting to Hubert L. Smith, assistant deputy comptroller, and who accepted service for said defendant, the within original, and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendants, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, by exhibiting to Robert H. Hutchins, managing clerk for Parsons, Shepard & Ogden, attorneys for said commissioners, the within original and at the same time leaving with him a copy for each thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant John B. McDonald, by exhibiting to De Lancey Nicoll, of the firm of Nicoll, Anable & Lindsay, attorneys for said defendant, the within original, and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, by exhibiting to Charles P. Howland of the firm of Howland, Murray & Prentice, as attorneys for said defendant the within original, and at the same time leaving with him with a copy thereof.

WILLIAM HENKEL,
U. S. Marshal, S. D. N. Y.

New York, August 25th, 1902.

4 (Endorsed:) U. S. circuit court, southern district of New York, Filed Aug. 26, 1902, John A. Shields, clerk.

5 In the Circuit Court of the United States for the Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, Defendants.

Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Charles T. Barney, a citizen of the State of New York and an inhabitant and resident of the southern district of New York, brings this, his bill of complaint against The City of New York, which is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York, The
6 Board of Rapid Transit Railroad Commissioners for the City of New York, a board organized and existing under and by virtue of the laws of the State of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as commissioners of rapid transit, John B. McDonald, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, each of whom is a citizen and inhabitant of the State of New York, and resides in the southern district of New York.

And thereupon your orator complains and says:

That the names, the residences and citizenship of the parties to this suit are correctly stated in the introduction of this bill: and the same are hereby incorporated by reference in this paragraph of this bill with the same effect as if the same were separately set forth here specifically and at length.

And your orator further shows that the above-named defendant, The City of New York, is a municipal corporation, organized and existing under and by virtue of the laws of the State of New York.

And your orator further shows that the above-named defendant, The Board of Rapid Transit Railroad Commissioners for the City of New York, was created, organized and exists under and by virtue of chapter 4 of the Laws of 1891, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," and of the several acts amendatory thereof and supplementary thereto. The said Board of Rapid Transit Railroad Commissioners, as plaintiff is informed and believes, has no power or authority to do any of the

acts or to take any of the proceedings hereinafter mentioned, except as it claims to have such power pursuant to and by virtue of the said chapter 4 of Laws of 1891 and the said several acts amendatory thereof and supplementary thereto.

And your orator further shows, on information and belief, that the above-named defendants, Seth Low, Edward M. Grout,
7 Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin are commissioners of rapid transit appointed or constituted as such pursuant to the provisions of the said statutes hereinbefore mentioned, and comprise and constitute the said Board of Rapid Transit Railroad Commissioners for the said City of New York, hereinafter referred to as the board.

And your orator further shows, on information and belief, that on the 15th day of July, 1902, the said Ira A. Shaler, departed this life, in the city of New York, intestate, and that thereafter letters of administration on the goods, chattels and credits of the said Ira A. Shaler were issued by the surrogate of the county of New York to the defendant Mary L. Shaler.

And your orator further shows that he is, and since the 30th day of April, 1870, has been seized in fee of all those certain lots, pieces or parcels of land, with the building and improvements thereon, situate on the easterly side of Park (or Fourth) avenue and the northerly side of Thirty-eighth street, and which taken together as one parcel are described as follows: Beginning at the northeasterly corner of Fourth avenue and Thirty-eighth street, thence running northerly along said side of Park (or Fourth) avenue fifty-seven feet and nine inches; thence easterly and at right angles with Park (or Fourth) avenue one hundred and fifteen feet; thence southerly and parallel with Park (or Fourth) avenue fifty-seven feet and nine inches to the northerly side of Thirty-eighth street, and thence westerly along said side of Thirty-eighth street one hundred and fifteen feet to the point or place of beginning; and is the owner of all the easements in said Park avenue in front of said premises appurtenant to the owners of property abutting on the public streets in the said city of New York.

And your orator further shows on information and belief, that on or about the 6th day of November, 1894, it was determined by vote of the people of the city of New York, as provided in sections
8 12 and 13 of chapter 752 of the Laws of 1894, that a rapid transit railway or railways should be constructed for and at the expense of said city, and thereupon various proceedings were had by the said board, assuming to act under the statutory provisions hereinbefore referred to, for the purpose of determining a route or plan of construction for such rapid transit railway. On the 14th day of January 1897, and the 4th day of February, 1897, the said board, by the concurrent vote of six members thereof, did determine that a rapid transit railroad for the conveyance and transportation of persons and property, in addition to those already existing, was necessary for the interest of the public and of the city of New York,

and did, on the said days, by the same concurrent vote of the said six members, determine that the route or routes and general plan of construction of a rapid transit railway for the conveyance and transportation of persons and property should be established in the city of New York, as set forth in a certain report transmitted by the said board to the common council of said city, as hereinafter stated. Copies of the said resolutions and said report to the common council are hereunto annexed, marked, respectively, Schedules "A" and "B," and are hereby made a part of this complaint.

That it was provided by section 4 of said chapter 4 of the Laws of 1891, as amended, that the general plan to be determined and established by the said board should show the general mode of operation of such railway, and should contain such details as to manner of construction as might be necessary to show the extent to which any street, avenue or other public place was to be encroached upon and the property abutting thereon affected.

The route or routes and general plan of construction as determined by the said board by the resolutions aforesaid, purported to comply with the foregoing provisions, and set forth, among other
9 things, a route to be constructed (in part) from a point under private property lying between Eighth and Ninth streets, and east of the westerly side or line of Lafayette place, produced, to Fourth avenue; thence under Fourth avenue and Park avenue to Forty-second street; thence turning from Park avenue into Forty-second street and taking for the purposes of the curve, if necessary or convenient, private property at the southwest corner of Park avenue and Forty-second street; thence under Forty-second street to Broadway. Said route was also to include suitable tracks and connections from the portion thereof near the corner of Park avenue and Forty-second street to the yard and tracks of the Grand Central station; it being provided that all of the tracks and connections last mentioned should be under Park avenue and Forty-second street and private property to be acquired. It was further provided as a part of the general plan of construction adopted by the said resolutions, that the route, from the southerly end of Centre street to the junction at or near One hundred and third street and the Boulevard, should consist of four parallel tracks; that the tracks should be of standard gauge—that is to say, of a width of 4 feet and $8\frac{1}{2}$ inches between the rails; that there should be $12\frac{1}{2}$ feet width in the tunnels and on the viaducts for each track, except that at stations, switches, turn-outs, curves and cross-overs the width might be increased to the extent permitted by the width of the tunnel; that the tracks wherever passing over or under the street should be placed over or under the central part of the street, except that no tunnel or viaduct or any wall, or part thereof, under or along a street, should, except at the stations, station approaches, curves and at places of access to sub-surface structures, as thereinafter in said resolutions provided, be within a distance of 5 feet from the exterior line or side of the street.

It was further provided that the maximum widths of the tunnel

in the clear should be, for the route under Park row and the
10 City Hall Park route, 38 feet; for the route from at or near the south end of Centre street and to the commencement of New Elm street, 50 feet; for the route from at or near the commencement of New Elm street to Lafayette place, 68 feet; from the route from at or near the commencement of Lafayette place to the junction at or near One hundred and third street, 50 feet, except that, wherever the nature of the streets necessitate a curve, an additional width of tunnel might be added not exceeding 3 feet for each track, and except that, on Fourth avenue from Thirty-second street to Forty-third street, the permissible width should be 65 feet. It was further provided that adjacent tracks should be connected by necessary and suitable switches and connections and an additional track for siding accommodation might be constructed not to exceed in length one-quarter of a mile for each mile of roadway, but provided always that the site of the tunnel should not, by the enlargement of the tunnel for that purpose, be brought within 5 feet of the exterior line or side of the street.

And your orator further shows, upon information and belief, that upon certain drawings or plans adopted by the said board, as set forth in said resolutions, and described as "drawings 1 to 60," it appeared that the plan of the said railway, for so much of the route aforesaid as passed under Fourth or Park avenues, from Thirty-second to Forty-third streets, showed a single tunnel, containing four parallel tracks, under the central part of the said Park avenue, and below a tunnel then and now existing under the surface of said street, and occupied by tracks of the Metropolitan Street Railway Company. The said drawings or plans further showed a width of about 59 feet between the interior or finished surface of the walls of said rapid transit tunnel, and a width of about 65 feet between the exterior surface of the walls of said rapid transit tunnel, and showed the exterior surface of the easterly wall of said tunnel to be at a distance of about 37½ feet
11 from the easterly building or house line of the said Park avenue, between Thirty-fourth and Forty-second streets.

Neither the said drawings, so adopted as aforesaid by said board, nor any of the contract or other drawings to be hereinafter mentioned, provided for any station, station approaches, curves or places of access to sub-surface structures, or for any additional tracks for siding accommodation upon the easterly side of said tunnel, or otherwise, under the said Park avenue between Thirty-fourth and Forty-first streets.

And your orator further shows, upon information and belief, that thereafter, on or about the 2d day of March, 1897, the said board transmitted to the common council of the said city of New York a report containing the said resolutions of January 14th and February 4th, 1897, including the said drawings, together with a brief statement of the reasons of the said board for the adoption thereof. Thereafter, on or about the 23d day of March, 1897, the said common council adopted a resolution approving the said plans and con-

clusions, and consenting to the construction of a railway or railways in accordance therewith. The said resolution of the said common council was thereafter approved by the mayor of the said city of New York on or about the 25th day of March, 1897. Thereafter, on or about the 3d day of April, 1897, the said board submitted the said routes and plans as contained in the said resolutions of January 14th and February 4th, 1897, together with the conclusions of the said board, to the department of public parks of the said city of New York, and thereafter, on or about the 12th day of April, 1897, the said department approved the said routes and plans and consented to the construction of the said rapid transit railway in accordance therewith.

And your orator further shows that thereafter, as by section 5 of said act of 1891 directed, the said board having obtained the approval and consent of the local authorities, proceeded to take
12 steps to obtain, if possible, the consent of the property owners along the line of the routes adopted by them; and in or about the month of May, 1897, your orator received a communication in writing from said board in which the said board represented to your orator that the said board had determined and established certain routes and general plan of construction for the said rapid transit railroad in the said city of New York; that the said communication further represented to the plaintiff that the said routes and general plan of construction were to be in accordance with the said resolutions of January fourteenth and February fourth, 1897, and that with the said communication were enclosed a copy of the said resolutions of January fourteenth and February fourth, 1897, and of the conclusions of the said board which had accompanied said resolutions in their transmission to the said common council of the said city of New York, and also there was so enclosed a proposed form of consent to the construction of the said rapid transit railroad in accordance with the said route and general plan of construction. That during the said month of May, 1897, the said Board of Rapid Transit Railroad Commissioners, by an agent in person, represented to your orator that the said board had established and determined the routes and general plan of construction of the said rapid transit railroad in accordance with the said resolutions of January fourteenth and February fourth, 1897. That your orator, believing the said representations and relying thereon, consented to the construction of the said rapid transit railroad in accordance with said route and general plan of construction, and did not oppose the proceedings hereinafter mentioned, which the said Board of Rapid Transit Railroad Commissioners instituted for the purpose of obtaining the determination of three commissioners appointed by the said appellate division that such rapid transit railroad ought to be constructed and operated; nor did your orator oppose the confirmation of said determination by the said appellate division.

13 And your orator further shows upon information and belief that the said board failed to obtain the consent of the owners of one-half in value of the property along the said routes of

the said proposed rapid transit railroad, and thereafter, as by the said statute provided, the said board, on or about the 3d of June, 1897, petitioned the said appellate division to designate six daily papers in the city of New York, in which notice should be published of an application for the appointment of three commissioners to determine whether or not said rapid transit railroad ought to be constructed. Upon the presentation of the said petition there was submitted to the appellate division, among other things, the resolutions of January 14th and February 4th, 1897, hereinbefore referred to, the report made by the board to the common council of the city of New York, together with the drawings or plans hereinbefore referred to and known as "drawings 1 to 60," and copies of the forms enclosed to property owners in requesting their consent. Thereafter such proceedings were had that commissioners were appointed by the said appellate division, who qualified, and, after proceeding to the taking of the testimony on public hearings, reported the same to the court, together with their determination that the said rapid transit railroad described in the said resolutions of January 14th and February 4th, 1897, and in the report of the said board to the said common council ought to be constructed and operated; and thereafter, on or about the 6th day of April, 1898, an order was entered in the office of the clerk of the said appellate division, whereby the said report was confirmed and the consent of the said court was given to the construction and operation of the said railway as hereinbefore described.

And your orator further shows, upon information and belief, that after obtaining the consents of the local authorities as aforesaid and the authorization of the said appellate division in lieu of the consent of the property owners, the said board, as directed by section 6 of said chapter 4 of the Laws of 1891, proceeded to prepare detailed plans and specifications for the construction of such rapid transit railway, and thereafter, on or about the 24th day of February, 1900, entered into a contract bearing date the 21st day of February, 1900, with the defendant, John B. McDonald, whereby the said John B. McDonald agreed fully to construct and equip the said rapid transit railway upon the routes and general plan hereinbefore referred to, in strict conformity with the specifications contained in said contract, and thereafter to use, maintain and operate the same under a lease thereof from the city of New York for the term of fifty years. It was provided in the said contract that it was made pursuant to the rapid transit statutes hereinbefore referred to, which were to be deemed a part thereof as if incorporated therein. It was further provided that the "routes and general plan" for the railroad adopted by the said board by its resolutions of January 14th and February 4th, 1897, theretofore approved by the authorities of the city and by the appellate division of the supreme court, should be deemed to be incorporated into the said contract as a partial description of the railroad and equipment, and a copy thereof was appended to the said contract; the said specifications provided that the said routes should run under the streets mentioned in the said

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resolutions of January 14th and February 4th, 1897, and further provided that the description therein contained, of the routes and general plan of construction of the said rapid transit railroad was told in general language, but that the location of the various tracks, junctions, routes, grades, termini, etc., were set forth more particularly on the accompanying "contract drawings." Said so-called "contract drawings" did not agree with the said routes and general plan of construction con-
15 tained in the resolutions of January 14th and February 4th, aforesaid, but unlawfully and wrongfully provided that there should be two tunnels for the said rapid transit railroad under the aforesaid portion of Park avenue instead of a single tunnel. It was provided that each of such tunnels should be 24 feet in width between the interior or finished surface of these walls and should each contain two tracks of standard gauge, and that these two tunnels should be 17 feet apart, and, according to said drawings, the exterior surface of the easterly wall of the easterly one of said tunnels would approach to within about 35 feet of the building or house line on the easterly side of Park avenue. All of which will more fully appear by reference to the said contract, specifications and drawings, when produced upon the trial of this action or the hearing of any motion herein.

And your orator further shows that thereafter the said McDonald entered into the performance of the work required to be done by the said contract, and the same is now in progress at various points. On or about the 14th day of September, 1900, as the plaintiff is informed and believes, said McDonald entered into a sub-contract with the said Ira A. Shaler for the construction of that portion of the route of the railroad running from a point 100 feet northwardly from the centre of Thirty-third street to the centre of Forty-first street, under the said Park avenue, in accordance with the provisions of the said contract of February 21st, 1900. Said Shaler thereafter entered upon the land under Park avenue between the streets aforesaid, and engaged in excavating, blasting and performing other general work incident to the construction of tunnels therein and that subsequent to his death, his personal representatives have been and are now engaged in excavating, blasting and performing other general work incident to the construction of the same.

And your orator further shows upon information and belief that the work of construction as now in progress under said Park
16 avenue between Thirty-fourth and Forty-first streets, is not being done in accordance with the said "contract drawings," referred to in the specifications forming part of the aforesaid contract, dated February 21, 1900, in that among other things, the said tunnels are 25 feet in width between their interior or finished surfaces instead of 24 feet, and the exterior surface of the easterly wall of the easterly tunnel instead of being within about 35 feet of the building line on the east side of Park avenue will be distant only about 7 feet therefrom. Plaintiff further shows that said work

as now in course of construction is not in accordance with the "routes and plan" contained in the said resolutions of January 14th and February 4th, 1897, before referred to, or with the drawings forming part thereof and known as "drawings 1 to 60," either as regards the location of the tunnels in the street or the general character thereof, in this, to wit: instead of a single tunnel, as indicated upon said "routes and general plan," the said contractors are engaged in the construction of two tunnels under the said Park avenue, each of which is to be of the width of 25 feet between the interior or finished surface of its walls; and said tunnels are not under the central part of the said Park avenue, but instead thereof the easterly one of the said tunnels is located much further to the eastward than the tunnel indicated upon said "routes and general plan," so that the easterly wall of said tunnel now being constructed will be more than 27 feet nearer to the house line of the houses on the east side of Park avenue between Thirty-fourth and Forty-first streets than the easterly line of the tunnel as shown on said "routes and general plan." That said work has been and is being thus performed by said defendant McDonald and the said Shaler without any authority other than certain directions given by the chief engineer employed by the Board of Rapid Transit Com-
17 missioners and embodied in certain so-called working drawings, or detail drawings, prepared by him or at his instance, and recently approved informally by said board.

And your orator further shows that the fact that such directions had been given by the chief engineer, and that said work was being thus performed by the contractors as aforesaid, was not until recently specifically known to said board; that such action of the said chief engineer and contractors has never been formally or specifically approved by said board; that there has been no change made or authorized by said board in the said "routes and general plan," nor has there been any modification of the contract or specifications with reference to the construction of that part of the tunnel lying under Park avenue between Thirty-third and Forty-first streets; that no notice was given to any of the property owners along said street that it was proposed, by the defendants, or any of them, to change the position of the tunnel to any material extent from the position shown and described in the said "routes and general plan," nor was any opportunity ever given to said property owners or the citizens generally to be heard with respect to any such change.

And your orator further shows that he had no knowledge that this work was being thus unlawfully carried on upon a route not authorized by law until in the month of March, 1902, when, in the course of the prosecution of said work, the foundations of several buildings on Park avenue between Thirty-seventh and Thirty-eighth streets were undermined and weakened and the buildings seriously damaged, and an investigation regarding the cause of said damage made public the fact that the tunnel was not being constructed according to the authorized plans.

That, as your orator is informed and believes, if the work of con-

struction is allowed to be thus unlawfully continued and if hereafter the railroad shall be allowed to be operated along the said illegal and unauthorized route, it will constitute a nuisance to your
18 orator's property and will greatly interfere with his various easements in said avenue and deprive him of the enjoyment thereof; that his buildings will be irreparably injured by the excavations made in said avenue in front of his said premises and by the vibrations caused by the operation of said road.

And your orator shows that, erected on his said premises, is a handsome and valuable four-story residence, in which he resides, and that during the past year, and prior to the time that he had any knowledge of the said changes in the plans for the construction of said tunnel, he made extensive alterations in his said residence at an expense of more than $200,000; and your orator is informed and verily believes that by reason of such illegal and unauthorized construction of said — particularly under the easterly portion of said Park avenue the risk of injury to his said residence, owing to the work of construction, has become much greater than it would have been had the work been done according to the "routes and general plan" adopted by the board as aforesaid, and the risk of damage after the railroad shall have been put in operation by reason of the vibration caused by trains or by other objectionable results is in like manner greatly increased; and that such acts will greatly and irreparably injure and damage your orator's said premises, and will interfere with and interrupt, and have aleady interfered with and interrupted, the lawful use and quiet enjoyment of the same and his other easements appurtenant thereto; that no steps have been taken to acquire said easements; that said unlawful construction has constituted and will constitute an appropriation of the same, and for the damages he will sustain he has no adequate remedy at law.

And your orator further shows upon information and belief, that at none of the times herein mentioned did the said Board of Rapid Transit Railroad Commissioners have authority (if at all) to enter into any contract for the construction of any rapid transit
19 rail road under or upon the said Park avenue, except in accordance with the said "routes and general plan" contained in the said resolutions of January 14th and February 4th, 1897, and that at no time did the said board have authority to prepare detailed plans and specifications, except (if at all) in accordance with the said general plan of construction or to alter any plans or specifications prepared by them, excepting in accordance with said general plan of construction. That the act of the said board in permitting the defendants McDonald and the said Shaler to enter upon that part of Park avenue between Thirty-third and Forty-first streets where the tunnel is now in process of construction, as aforesaid, was illegal and unauthorized and the defendants McDonald and the said Shaler have entered upon the same unlawfully and without authority; and for the further reason that the construction of the rapid transit railway on the easterly side of Park avenue, in front of your orator's said premises takes his property without due

process of law, in violation of the provisions of the fourteenth amendment to the Constitution of the United States, and that said rapid transit act so far as it purports to authorize the construction of a tunnel and railway in said Park avenue without the consent of abutting owners or compensation therefor is void because it deprives your orator of his property without due process of law, in violation of the provisions of the said amendment.

That this suit arises under the Constitution and laws of the United States, and the matter in dispute herein exclusive of interests and costs exceeds the sum and value of two thousand dollars.

To the end, therefore, that your orator may obtain relief in this honorable court where alone it can obtain adequate relief, your orator humbly prays:

First. That the said defendants and each of them, their agents and servants, be enjoined and restrained from further con-
20 structing, or doing any act towards the construction, of a rapid transit railroad tunnel, or the operating of a railroad therein, under Park avenue adjacent to complainant's said premises, until the easements appurtenant thereto shall have been duly acquired according to law and due compensation therefor made to complainant.

Second. That the said defendants, and each of them, their agents and servants, be enjoined and restrained from further constructing or doing any act toward the construction of a rapid transit railroad tunnel in any part of the sub-surface of Park avenue adjacent to complainant's said premises lying within 37 feet to the west of the building or house line of the easterly side of said Park avenue, or from continuing the work of tunnel construction in such a manner that the easterly side of the tunnel or of the excavation therefor is nearer to the building or house line than the tunnel described and shown in the "routes and general plan" adopted and approved as aforesaid.

Third. That the said defendants, The Board of Rapid Transit Railroad Commissioners, and the members thereof, their agents and servants, and all persons claiming under or through them, be enjoined from giving, granting or in any manner conferring on any person or persons whomsoever, the right, liberty or franchise of excavating under the said Park avenue, adjacent to complainant's said premises, for the purpose of constructing any tunnel whatsoever for a rapid transit railway, or operating a railroad therein, except as aforesaid.

Fourth. That the said defendants be required to fill in the excavations or tunnels unlawfully made, as hereinbefore set forth, in said part of the said sub-surface of Park avenue, and to restore that part of said sub-surface to the state and condition in which it existed previous to such excavations.

21 Fifth. That the defendants, and each of them, their agents and servants, be restrained and enjoined in the manner aforesaid during the pendency of this action.

Sixth. That the plaintiff have such other and further relief as to the court may seem just, together with the costs of this action.

MASTEN & NICHOLS,
Solicitors for the Complainant.

Office and post-office address, No. 49 Wall street, borough of Manhattan, New York city.

MAXWELL EVARTS,
ARTHUR H. MASTEN,
Of Counsel.

22 *Verification.*

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

Arthur H. Masten, being duly sworn, deposes and says that he is one of the solicitors for the complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof, and the same is true of his knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent is that the plaintiff is not at present within this country, but is abroad traveling in Europe; that the sources of deponent's information and the grounds of his belief as to the matters alleged in the complaint are conversations had with plaintiff in relation to this matter and an inspection of correspondence and papers in relation thereto now in his possession.

ARTHUR H. MASTEN.

Sworn to before me this 23rd day of August, 1902.

FORSYTH WICKES,
Notary Public (*No.* 141), *New York County.* [SEAL.]

23 SCHEDULE A.

Resolutions Adopting Routes and Plan of Construction.

Resolution of January 14, 1897.

Whereas, this Board of Rapid Transit Railroad Commissioners for the City of New York has determined that a rapid transit railway for the conveyance and transportation of persons and property, in addition to those already existing, is necessary for the interests of the public and of the city of New York, and should be established as hereinafter provided; and

Whereas, this board has duly made the inquest and investigation

necessary or proper in the premises, and all such inquests and investigations as are necessary or proper for such determination;

Now, therefore, this board does hereby, in lieu of all the routes and every route hereby adopted as aforesaid by this board or its predecessors, all and every one of which routes are hereby abandoned, and in lieu of all the general plans and every general plan and of all plans and specifications and every plan and specification for the construction of a rapid transit railway or railways in the city of New York, heretofore adopted by this board or by its predecessor, for all of which general plans other plans and specifications are hereby adopted, adopts the following routes for a rapid transit railway in the city of New York, and does hereby determine and establish the said routes as follows, and does hereby adopt a general plan of construction of the said railway, the routes of which are herein provided, and does in such general plan hereby adopted, show, as follows, the general mode of operation and such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon:

24

Routes.

One route as follows: Its centre line shall commence at a point at or near the intersection of Broadway with Park row; thence under Park row and Centre street to a point at or near its intersection with New Elm street as proposed; thence under New Elm street, as proposed, to Lafayette place; thence under Lafayette place to Eighth street; thence acrossand under Eighth street, and thence under private property lying between Eighth and Ninth streets and east of the westerly side or line of Lafayette place, produced to Fourth avenue; thence under Fourth avenue and Park avenue to Forty-second street; thence turning from Park avenue into Forty-second street, and taking for the purposes of the curve, if necessary or convenient, private property at the southwest corner of Park avenue and Forty-second street; thence under Forty-second street to Broadway; thence under Broadway to Fifty-ninth street; thence under the Boulevard to a point at or near One hundred and twenty-fourth street; thence by viaduct along and over the Boulevard to a point at or near One hundred and thirty-fourth street; thence under the Boulevard and Eleventh avenue to a point on Eleventh avenue, situate north of One hundred and ninetieth street, and distant therefrom not less than one thousand and not more than one thousand five hundred feet, and thence under or over (as may be most convenient) private property to a point at the southeast end of Ellwood street near Hillside street, and thence over Ellwood street to Kingsbridge avenue or Broadway; thence over Kingsbridge avenue or Broadway, as now proposed, to Riverdale avenue, and thence easterly over Riverdale avenue to a point within five hundred feet of the present Kingsbridge station of the New York and Putnam Railroad Company.

This route shall include a loop at the City Hall park which
25 shall connect with the portion of the route aforesaid along Centre street at or near the south end of that street, and thence proceed westerly and southerly under City Hall park and Broadway, and thence easterly to again connect with the portion of the route aforesaid in Park row. All of the said loop shall lie under City Hall park, Park row, between the south end of Centre street and Ann street, and the portion of Broadway adjoining the City Hall park lying between Vesey and Murray streets. This route shall also include suitable tracks and connections from the City Hall loop to the post-office, such tracks and connections being under the City Hall park and under the portion of Park row between the south end of Centre street and Ann street. This route shall also include suitable tracks and connections from the portion of the route near the corner of Park avenue and Forty-second street to the yard and tracks of the Grand Central station. All of the tracks and connections last mentioned shall be under Park avenue and Forty-second street and private property to be acquired. By private property in this description is meant property not forming part of the streets of the city of New York and not belonging to the city of New York.

Also a route as follows: Its centre line shall diverge from the route aforesaid on the Boulevard, between a line parallel to and one hundred feet north of One hundred and third street and a line parallel to and one hundred feet south of One hundred and third street; thence under private property to a point in One hundred and fourth street; thence under One hundred and fourth street to and across Central park, west; thence under Central park to the intersection of Lenox avenue and One hundred and tenth street; thence under Lenox avenue to a point near One hundred and forty-second street; thence curving to the east and passing under private property, One hundred and forty-third and One hundred and forty-
26 fourth streets, to the Harlem river at or near the foot of One hundred and forty-fifth street; thence under the Harlem river and private property to East One hundred and forty-ninth street at or near its intersection with River avenue; thence under East One hundred and forty-ninth street to a point near its intersection with Third avenue; thence with a curve to the left and under Third avenue to a point near its intersection with Westchester avenue; thence with a curve to the right to and under Westchester avenue, and thence by viaduct over and along Westchester avenue to the Southern boulevard; thence over and along the Southern boulevard to the Boston road, and thence over and along the Boston road to Bronx park.

Plan of Construction.

The general plan of construction of the road is as follows:

For the route under Park row and the said loop at City Hall park, two parallel tracks; for the route from the point of connection of the City Hall loop with the route aforesaid at the southerly end of

Centre street to the junction at or near One hundred and third street and the Boulevard, four parallel tracks; for the route from the junction at or near One hundred and third street and the Boulevard to the New York and Putnam Railroad Company's station at Kingsbridge, two parallel tracks; for the route from the junction at or near One hundred and third street and the Boulevard to Bronx park, two parallel tracks.

All of the above mentioned tracks shall be placed on the same level, except that wherever required by special necessities of surface or sub-surface structures or other special or local necessities and for the purpose of avoiding grade crossings at the southerly end of Centre street and the One hundred and third Street junction, any one or more of the tracks may be depressed below the level of the other tracks to a depth of not more than twenty feet.

27 The tracks shall be of standard gauge, that is to say, of a width of four feet and eight and a half inches between the rails.

There shall be twelve and a half feet width in the tunnels and on the viaducts for each track, except that at stations, switches, turnouts, curves and crossovers the width may be increased to the extent permitted by the width of the tunnel. The tracks wherever passing over or under the street shall be placed over or under the central part of the street, except that no tunnel or viaduct or any wall or part thereof under or along a street, shall, except at the stations, station approaches, curves, and at places of access to subsurface structures, as hereinafter provided, be within a distance of five feet of the exterior line or side of the street. The tracks shall in all cases be placed in tunnels, except only that on the west side route on the Boulevard at or near One hundred and twenty-fourth street the tracks shall emerge from the tunnel and be carried upon a viaduct along the Boulevard to a point at or near One hundred and thirty-fourth street and there be taken again into tunnel, and except also that on the west-side route at a point at or near One hundred and ninetieth street the tracks shall again emerge from the tunnel and be carried upon a viaduct over private property and the above-mentioned streets to the Kingsbridge station, and except also that on the east side from a point on Westchester avenue at or near Bergen avenue the tracks shall emerge from the tunnel and be carried upon a viaduct over and along Westchester avenue and the other streets above-mentioned to Bronx park.

Wherever the tracks change from tunnel to viaduct, or from viaduct to tunnel, the change shall be so made as to occupy or obstruct the use of the surface of the street to the least possible extent consistent with the proper gradient for the tracks.

The roof of the tunnel shall be as near the surface of the street as street conditions and grades will permit. The tunnel shall
28 not be less than thirteen feet in height in the clear. The maximum widths of the tunnel in the clear shall be as follows:

For the route under Park row and the City Hall Park loop, thirty-eight feet; for the route from at or near the south end of Centre

street and to the commencement of New Elm street, fifty feet; for the route from, at or near the commencement of New Elm street to Lafayette place, sixty-eight feet; for the route from, at or near the commencement of Lafayette place to the junction at or near One hundred and third street, fifty feet; for the west-side route from the junction at or near One hundred and third street to Kingsbridge station, twenty-five feet; and for the east-side route from, at or near the junction at One hundred and third street to Bronx park, twenty-five feet; except that wherever the nature of the streets necessitates a curve that an additional width of tunnel may be added not exceeding three feet for each track, and except that on Fourth avenue, from Thirty-second street to Forty-third street, the permissible width shall be sixty-five feet; and for the tunnel beneath the Harlem river and its approaches, the permissible width shall be thirty-five feet. At each cross-street where accommodations for pipes, wires, sewers and other subsurface structures have been provided within the tunnel, the tunnel may, in order to provide convenient access to such pipes, wires, sewers and other subsurface structures have, within the limit of the sides or exterior lines of such cross street or such lines produced an additional width on each side of the route not to exceed fifteen feet, and the area of additional width on either side not to approach nearer than twelve feet to either side or exterior line of such cross street. Footways between the tracks shall be provided the whole length of the line and accommodations arranged for the convenience and protection of employees.

29 Whenever necessary for the proper support of the street surface, the roof of the tunnel shall be of iron or steel girders with brick or concrete arches supported by iron or steel columns and masonry walls, or the roof should be a masonry arch. Viaducts shall be built with a width of twelve and one-half feet for each track and with an additional width of three feet on each side for outside footways. Viaducts may be built of metal or masonry or of both.

Adjacent tracks shall be connected by necessary and suitable switches and connections, and an additional track for siding accommodation may be constructed not to exceed in length one-quarter of a mile for each mile of roadway, but provided always that the side of the tunnel shall not, by the enlargement of the tunnel for that purpose, be brought within five feet of the exterior line or side of the street.

Along Elm street, wherever the tunnel shall be in the clear not less than sixty-eight feet wide, the pipes, wires, sewers and other subsurface structures shall be placed in suitable galleries in the tunnel at the outside of the exterior tracks. But any such pipes, wires, sewers and other subsurface structures may be placed in suitable galleries beneath the tracks, or such pipes, wires, sewers and other subsurface structures may be placed in the ground above or at the sides of the tunnel, or at the outside of the exterior tracks, and whenever so placed beneath the tracks, or in the ground above or at the sides of the tunnel, the width of the tunnel on New Elm street shall not be

more than fifty feet. Pipes, wires, sewers and other subsurface structures shall, at any part of the said routes, be removed or disturbed only when necessary for the construction and operation of the railway, and, if removed or disturbed, shall be placed under the streets in such manner and in such location that the use and service thereof shall not be impaired. Such pipes, wires, sewers and other subsurface structures shall be left or shall be so arranged as to give free access for their repair or alteration, or for the placing with them of new pipes, wires, sewers and other like structures, and for making connections between the same and buildings at any time.

30 Stations and station approaches shall, in general, be at the intersection of streets and shall be built under, or, if the position of the tracks so require, over, the streets and immediately adjoining private abutting property or through private property to be acquired for the purpose, or both under or over streets and through private property as aforesaid, except that on the Boulevard, stations and station approaches may be in the centre of the street. The streets under or over which stations or station approaches shall be built may include cross-streets, but no part of any cross-street shall be used for a station or station approach at a distance greater than seventy-five feet from the exterior line or side of the street of the route. The word "street," wherever used herein, shall include an avenue or public place.

Along the Boulevard there may be openings in the surface of the street from the tunnel for the purpose of ventilation and light; such openings shall be guarded by convenient and ornamental inclosures. The openings shall not exceed twenty feet in width and fifty feet in length. No two openings shall be within fifty feet of each other. No opening or part thereof shall be within the limits of, or opposite to, any street intersecting the Boulevard; and within the distance of any one block on the Boulevard between any two adjacent crossing streets there shall not be more than two such openings.

The general mode of operation shall be by electricity or some other power not requiring combustion within the tunnels or on the viaducts, and the motors shall be capable of moving trains at a speed of not less than forty miles per hour for long distances, exclusive of stops.

The manner of construction shall be by tunneling or open excavation; it is further

Resolved That plans be prepared to show the route and

31 general plans in so far as they are hereby adopted, which said plans, when formally adopted, shall be deemed to be incorporated herein and to form a part hereof.

Resolutions of February 4th, 1897.

Resolved, That this Board of Rapid Transit Railroad Commissioners for the City of New York hereby adopts the drawings now produced and numbered from 1 to 60, both inclusive, as showing the route and general plan adopted by resolution of this board on Jan-

uary 14th, 1897, and that as provided in the said resolution the said drawings be deemed incorporated in and to form part of said resolution; and it is further

Resolved That the said route and general plan with the said drawings, and the said resolution of January, 1897, be, and they hereby are, adopted by this board.

32 SCHEDULE B.

Report to the Common Council.

Office of the Board of Rapid Transit Railroad Commissioners for the City of New York, No. 256 Broadway, New York city.

To the honorable the common council of the city of New York:

The Board of Rapid Transit Railroad Commissioners for City of New York, constituted by and according to the provisions of chapter 4 of the Laws of 1891, as amended by chapters 102 and 556 of the Laws of 1892, by chapters 528 and 752 of the Laws of 1894, by chapter 519 of the Laws of 1895, and by chapter 729 of the Laws of 1896, has duly considered and determined whether it is for the interests of the public and of the city of New York that a rapid-transit railway or railways for the conveyance and transportation of persons and property should be established therein, and has determined that a rapid-transit railway in addition to those already existing is necessary for the interests of the public and of such city, and by the concurrent votes of six members of the board has determined and established the routes and general plan of construction thereof, and hereby transmits to your honorable body a copy of its plans and conclusions as adopted, including such routes and general plan of construction.

First. The said commissioners, immediately after their respective appointments, severally took and subscribed the oath of office prescribed by law, which said oaths are filed in the office of the clerk of the city and county of New York. This board organized by the election, on the eighth day of June, 1894, of Alexander E.
33 Orr to be its president, and on the 28th day of June, 1894, of John H. Starin to be its vice-president, and of John Claflin to be its treasurer. The board duly framed and adopted by-laws and established rules and regulations for the proper exercise of the powers and duties conferred upon the board. It adopted a seal, and has kept a record of its proceedings, which at all reasonable times has been open to public inspection. This board has, since its organization aforesaid, conducted the inquest and investigation necessary in the premises as to whether it were for the interest of the public and the city of New York that a rapid transit railway or railways for the conveyance and transportation of persons and property should be established therein; and this board did thereupon on the

14th day of January, 1897, determine as aforesaid that such a railway, in addition to those already existing, was necessary.

Second. On or about the 9th day of May, 1895, this board transmitted to your honorable body a certain report and communication, together with certain resolutions of this board adopting plans and conclusions and prescribing routes and general plan for a rapid transit railroad in the city of New York, and also certain drawings or exhibits showing the said routes and general plan. The said plans, conclusions, routes and general plan were subsequently and prior to the sixth day of June, 1895, approved by your honorable body, by the mayor of the city of New York, by the park department of the city of New York, and by the commissioner of street improvements of the twenty-third and twenty-fourth wards of the city of New York. The said routes and general plan were not consented to by the owners of a majority in value of the property abutting upon the streets proposed to be occupied by the said routes, and thereupon the said routes and general plan were presented to the general term of the supreme court on or about the 14th day
34 of June, 1895, for its consent in lieu of the consent of the said property owners. Thereupon, pursuant to law, the said general term appointed Frederick R. Coudert, George Sherman and William H. Gelshenen as commissioners to determine whether the railroad so proposed upon the said routes and general plan ought to be constructed. Thereafter the said commissioners duly determined that such railroad ought to be constructed; and such determination was duly reported to the appellate division of the supreme court for its confirmation. Thereupon and on or about the 3d day of June, 1896, said appellate division refused to confirm said determination or to consent to the said routes and general plan. Desiring to obviate the objections made by the appellate division to the said routes and general plan so formerly proposed, this board has further considered the same and has concluded and determined, in lieu of all such routes and general plan, all of which have been duly rescinded, to adopt, and has adopted, the routes and general plan herewith submitted. The same are set forth in the resolution duly adopted by this board on the 14th day of January, 1897, and the further resolution duly adopted by this board on the 4th day of February, 1897, copies of which resolutions are annexed to this report as a part thereof. This board hereby submits for your consideration the routes and general plan of construction mentioned in the said resolutions for a rapid-transit railway for the conveyance and transportation of persons and property in the city of New York in addition to those already existing, and also the drawings, numbers 1 to 60, both inclusive, mentioned in the said resolutions.

Third. This board, in reaching the conclusions and preparing the plans which it has thus adopted, has considered a very large amount of information and arguments submitted to this board and its members by many citizens and by distinguished experts, as well as the information derived through the personal observation and investiga-

tion of the members of the board. In addition to the infor-
35 mation received by the board and its investigation which are set out in the report of this board to your honorable body on or about the 9th day of May, 1895, this board has been aided by the prolonged investigation before the said commission, consisting of Messrs. Coudert, Sherman and Gelshenen. That commission sat from 18th December, 1895, to the 26th February, 1896, and examined a great number of witnesses, including many distinguished engineers and citizens of New York. Their report, together with the testimony taken by them, was submitted to the appellate division prior to its refusal to confirm or consent, as mentioned in the second paragraph of this report. The grounds for the refusal by the appellate division of its consent were principally as this board understands, the cost of the rapid transit road then proposed, which including a very large allowance for contingencies, was to be between $49,000,000 and $50,000,000 and its proposed occupation of Broadway with the elements of doubt and danger, real or supposed, attending such occupation, and especially the doubtful elements of cost incident to the construction of a four-track tunnel with pipe galleries occupying substantially the entire width of Broadway from the city hall to Twenty-third street.

Fourth. The cost of the rapid transit railroad now proposed upon the routes and general plan now submitted to your honorable body will not, in the opinion of this board, reached by this board after careful consideration (including the cost of all real estate required to be taken in fee), exceed thirty-three million- of dollars, being less by twenty-two millions of dollars than the statutory limit of fifty-five millions of dollars. No part of Broadway is to be taken south of 42d street; and there is no part of the proposed road which involves elements which are unusual in engineering or involve material doubt as to cost or any material outlay incident to
36 the care of the buildings on abutting property. The road is to be in tunnel except for a distance of about 2,800 feet at Manhattan valley and at the extreme northern portion of the route where streets are to be occupied by viaducts.

The uptown terminus of the route on the west side is to be over 2½ miles north of 185th street, which was the uptown terminus of the west-side route formerly proposed to your honorable body. The uptown terminus of the east side route now proposed is more than 3⅞ miles to the north and east of 146th street, which was the uptown east-side terminus of the rapid transit road formerly proposed. The rapid transit board is informed and has every reason to believe that the extensions of the rapid transit railroad now proposed to the north of the Harlem river have the general approval of the citizens of that part of the city as constituting as nearly a complete solution for them of the rapid transit problem as existing conditions permit. The proposed road is to be in tunnel, as near the surface of the street as street conditions permit, except at the crossing of Manhattan valley, and except besides at the extreme northern parts of the east and west routes.

All the board said in its former report made to your honorable body in behalf of the general plan of construction then proposed is applicable to the general plan now proposed, except only that the difficulties and cost incident to construction on Broadway have been obviated, and except that the extreme northern portions of the road are to be upon viaducts rather than in tunnel.

Fifth. The principal features of the plan of construction are these:

1. The tracks are to be placed substantially upon a level.

2. The railway is to be placed as near the surface as street conditions will permit. This renders the road more accessible to
37 passengers than would any other plan of construction. At nearly all of the stations, except the very few stations on the extreme northern portions of the road where the road is to be upon viaduct, the platforms will be reached by stairways much shorter than the shortest stairways providing access to the present elevated railroads, both on account of grades and because, in going down to a railroad, the passenger reaches the platform before the tracks are reached, whereas, on the elevated roads the platforms are reached by climbing higher than the tracks.

3. The total depth of excavation necessary for the construction of the railroad and its foundation will be in general only about twenty feet. There is no portion of the road now proposed where construction, conducted with most ordinary care, involves any risk whatever to neighboring buildings.

4. The method of construction proposed by the board is neither experimental nor untried. The work will be attacked at as many points along the route as may be desirable. The progress of construction will be expedited to the utmost, and the discomforts and delays resulting therefrom reduced to the minimum.

5. The railway tracks are to be of standard gauge, and the railway cars will be large and commodious.

Sixth. This board has refrained for the present from extending the route from the city hall under Broadway to the South ferry. The board learns that there is a strong sentiment among owners of property on lower Broadway and of owners throughout the entire section of the city south of the southern terminus of the road as now proposed, in favor of the extension to the South ferry, and that some of them are endeavoring to secure the assent to the extension of the owners of a majority of the property abutting on lower Broadway. If the effort succeed the board will feel itself bound to
38 consider the question of establishing a route to the South ferry.

In witness whereof, this board has caused its official seal to be hereto affixed, and these presents to be witnessed by its president and secretary this fourth day of February, one thousand eight hundred and ninety-seven.

[L. S.] A. E. ORR, *President.*

LEWIS L. DELAFIELD, *Secretary.*

39 *Affidavit of Anderson H. Tyson.*

Supreme Court, County of New York.

CHARLES T. BARNEY, Plaintiff,
against
THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, and Ira A. Shaler, Defendants.

STATE OF NEW YORK, *County of New York,* } *ss:*

Anderson H. Tyson, being duly sworn, deposes and says:

I reside in the county of Essex, in the State of New Jersey. I am by profession a civil engineer, and I am a member of the American Society of Civil Engineers. I have been engaged in the active practice of my profession for over twenty years, and during that time have had a very considerable experience in connection with tunnel work and excavations in city streets, particularly in the city of New York. I have been employed on railroads and water works construction; also by the Metropolitan Street Railway Company
40 in connection with the work of cable construction on Lexington avenue and Columbus avenue of this city; I was also for one year chief engineer for the firm of J. D. & T. E. Crimmins, contractors, who were largely engaged in the work of sewer construction and street improvements, and for six years last past I have had charge of the excavation work for Charles T. Wills, a well-known builder in this city.

At the request of the plaintiff herein I have made several examinations of the work of tunnel construction now in progress by the contractors for the rapid transit railway under the surface of Park avenue between Thirty-fourth and Forty-second streets.

The first of such examinations was made in the month of March, 1902, directly after the occurrence of the caving in of the east side of the surface of Park avenue, between Thirty-seventh and Thirty-eighth streets, which had caused an undermining and settling of the front walls of several dwellings on that block. I subsequently again examined the work on the 3d and 12th days of June, 1902. Upon the east side of the tunnel my investigations were confined to that part of the work between Fortieth street and the lower side of Thirty-eighth street, although on the westerly side of the tunnel I went through the entire length of the work between Thirty-fourth and Forty-first streets. On the occasion of these examinations I took various measurements to learn the dimensions of the tunnel at various points as then completed or in process of construction.

I have further examined the so-called "routes and general plan" adopted by the board of rapid transit railroad commissioners, by resolution dated January 14th, 1897, and February 4th, 1897, and certain drawings described therein as "drawings 1 to 16," and forming a part thereof, said routes and general plan being, as I am informed, those that were thereafter submitted to the appellate division of the supreme court and approved by said court.

41 I have also examined certain so-called "contract drawings" prepared in connection with the contract between the Board of Rapid Transit Railroad Commissioners and John B. McDonald, entitled "Contracts for construction and erection of rapid transit railroad, with supplemental agreements, dated February 21st, 1900," which said drawings are referred to in chapter 2, page 56, of a printed copy of said contract, procured, as I am informed, from the office of the chief engineer of said board.

From my examination of the various drawings aforesaid, and from my investigations and measurements taken on the work I have prepared a diagram, hereunto annexed as a part of this affidavit, upon which I have indicated the surface of Park avenue at its intersection with Thirty-eighth street, showing the location of the east and west building lines and the east and west curb lines thereof.

I have indicated on the said diagram the relative locations under the surface of the said Park avenue of (1) the proposed rapid transit tunnel, as shown upon said "drawings, Nos. 1 to 60," forming part of the routes and general plan, the same being marked "A," "B" and "C," and indicated upon my said diagram in blue ink; (2) the location of the proposed rapid transit tunnels as shown by the so-called "contract drawings," the same being marked "D" and "E." The proposed tunnel "E" (which has not been excavated) is indicated in red ink; and (3) the location of the easterly rapid transit tunnel as now in process of construction under Park avenue, the same being marked "F," and indicated in black ink, as is also the existing westerly tunnel under Park avenue before described as "D."

The tuunel shown by "drawings Nos. 1 to 60," and marked on my diagram "A," "B" and "C," was a single tunnel containing four parallel tracks under the central part of the said Park avenue, and lying below a tunnel then and now existing under the surface of

42 said avenue and occupied by the tracks of the Metropolitan Street Railway Company. The location of said existing street-railway tunnel is designated on the said diagram as "G." According to the plan of said tunnel "A," "B" and "C," there was was a width of about 59 feet between the interior or finished surface of the walls of the tunnel, and a width of about 65 feet between the exterior surface of the walls thereof. The exterior surface of the easterly wall of said tunnel "C" was distant 37½ feet from the building or house line of Park avenue.

By the so-called "contract drawings" it appeared that so much of the route of the tunnel as passed under Park avenue from Thirty-fourth to Forty-second streets was to consist of two tunnels instead of a single tunnel; that said two tunnel were not to be under the cen-

tral part of said Park avenue, but instead thereof the exterior walls of each of the two said tunnels was to be located about 2 feet nearer the curb line, the easterly line of said easterly tunnel being shown to be distant 35 feet from the easterly building line of Park avenue.

As shown upon said "contract drawings," each of the two said tunnels was to be of the width of 24 feet between the interior or finished walls. I ascertained by measurement, however, that, as completed, the westerly tunnel marked "D" is, as a matter of fact, 25 feet between the interior or finished walls.

The easterly tunnel "F," now in process of construction, is not being constructed in accordance with the plan shown either on said "drawings 1 to 60" or said "contract drawings." The exterior wall thereof is being excavated to a point about 25 feet nearer the street or building line of said Park avenue than the easterly wall of the easterly tunnel shown on the "contract drawings" marked "E," and 27½ feet nearer said street or building line than the easterly line of the tunnel "C." The easterly line of the excavation of said easterly tunnel will, when completed, be within 7 feet of the house or street line on the easterly side of Park avenue. The distance
43 between said extreme easterly line and the extreme westerly line of the westerly tunnel will be in all 97 feet 5 inches.

At the time of my examination in March I observed the character of the soil under the surface of Park avenue in the immediate neighborhood where it was undermined, as hereinbefore stated. I found it to consist, near the building line, of disintegrated micaceous gneiss, a material of slight bearing capacity and of such unstable character as to be easily displaced, when partially disturbed, by any weight that may be upon it. I was satisfied at that time that if the work of excavation was continued by the contractor along the line at which he was then working and in the same manner it would almost inevitably result in serious damage to the buildings erected upon the easterly side of Park avenue. None of the concrete lining at that part of the work had been done, although preparations therefor had been made at about Fortieth street, and footings for the side walls had been put in place. The practice of tunnel driving in material of this kind, without immediately following it up with a lining, so as to retard any movement of the superincumbent material, is unusual.

As I am informed, the work of construction was suspended shortly after the accident at the request of the property owners, and was only recently resumed. It was in progress at the time of my recent visits in June. I then noticed that many precautions had been taken by the contractor by means of shoring up the soil with timbers and braces, so as to avoid the possibility of further movement. I am not willing to say, however, from my experience, that the work, even as carried on at the present time, is free from possibility of danger. Certainly there is much more liability of injury to the buildings and annoyance to the occupants from blasting, and much

44 greater risk from vibration after the tunnel shall have been completed than there would have been had the excavation been made, instead of as at present, either along the line shown on the contract drawings or as indicated on the "drawings Nos. 1 to 60" adopted as aforesaid in the routes and general plan.

At the request of Mr. Arthur H. Masten, one of the solicitors for the complainant herein, I inspected the tunnel in front of Mr. Barney's house, on the 19th day of August and found that for a distance of eight (8) feet south of the northern line of the property it had been blasted out to the full width of the tunnel or about to a clear width of 15′ 6″ east of the center line, work had been done for a distance of about seven (7) feet more, leaving about three feet of material to be removed to secure the full width on that side. Holes had been drilled along the eastern line of the tunnel and were ready to be charged and fired. This line is about seven (7) feet west of the foundation wall of the Barney house.

At that point deponent found the rock to be of the same general character as that I found on my first inspection in March last, referred to in my affidavit herein. That on the 7th day of August, 1902, at the request of the attorneys for Mrs. Arabella D. Huntington, I made an inspection of said tunnel and made a report on the same, which said report was embodied in an affidavit made by me and which I am informed was used on a motion made by Mrs. Huntington in this court for a preliminary injunction, restraining the defendant herein from further prosecuting the work on said tunnel in said Park avenue.

ANDERSON H. TYSON.

Sworn to before me this 23rd day of August, 1902.

FORSYTH WICKES,
Notary Public (*No.* 141), *New York County.* [SEAL.]

(Here follows diagram marked page 45.)

46 *Affidavit of Forsyth Wickes.*

Supreme Court, County of New York.

CHARLES T. BARNEY, Plaintiff,
against
THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, and Ira A. Shaler, Defendants.

SOUTHERN DISTRICT OF NEW YORK, *County of New York,* } ss.:

Forsyth Wickes, being duly sworn, says that he is an attorney and counsellor at law, and managing clerk for Masten & Nichols, solicitors for Charles T. Barney, the complainant in this suit. That Mr. Barney is now traveling in Europe and will not return to this country for several weeks. That on the 17th day of June, 1902, and just before his departure for Europe, Mr. Barney made an affidavit which was used on a motion in the supreme court of the State of New York, which motion was made by Mr. Barney in the capacity of a tax payer, to restrain the defendants herein from further prosecuting the work of the construction of the easterly tunnel
47 under Park avenue between Thirty-second and Forty-first streets. That said motion has not yet been determined and deponent is informed and verily believes that the said affidavit is now in the hands of the judge before whom the motion was heard. That deponent has a true copy of the same, which affidavit after reciting the fact that he is the owner of the property on the north east corner of Park avenue and Thirty-eighth street in the borough of Manhattan and State of New York, proceeds as follows:

The property was for many years owned and occupied by my father, the late Ashbel H. Barney, from whose estate I acquired it. I have lived in the house over thirty years, and it is my desire to continue to occupy it. It is not in the market for sale, although I have had numerous offers to purchase it on very advantageous terms.

I am the owner of a large amount of real estate situated in various portions of the borough of Manhattan, and have been for this reason interested in the development of the rapid transit system. In the year 1897, when the consent of property owners was requested to the route and general plan of construction of the rapid transit railroad, adopted by the board of rapid transit commissioners by resolutions of January 14th and February 4th, 1897, I signed such consent as the owner of the property upon Park avenue above described. I cannot at this date recall whether I learned of the extent to which

it was proposed to use and occupy Park avenue through the newspapers or through the medium of a circular which, as I am informed and believe, was sent out to property owners, with the proposed consent, at the time when such consents were solicited. I do, however, recall with certainty that before signing such consent I was satisfied, from the information which I had obtained from one source or the other, that the proposed tunnel was to be constructed under the tracks of the Metropolitan Street Railway Company then existing in the street, and that such construction was to be in the cen-
48 tre of the street, instead of at either side thereof, and that the most easterly track was to be more than thirty (30) feet distant from my building line.

In the month of April, 1901, I had in contemplation the erection of an extension to my residence, and making of various alterations and improvements therein, involving the expenditure of considerable money. By this time the work of tunnel construction was in progress in Park avenue, in the vicinity of my house, and, before proceeding to the completion of the proposed improvements, I desired to satisfy myself that there was nothing in the existing conditions attending the construction of the tunnel which would make it inadvisable for me to carry on the work. I accordingly applied to Mr. John B. MacDonald, the rapid transit contractor, for information as to exactly what he was doing or proposed to do in that part of the tunnel adjacent to my premises, and in reply I received from him a letter, of which I hereunto annex a copy, accompanied by a diagram, also presented herewith. As it did not appear from this diagram that the tunnel would be constructed on any lines making its most easterly end nearer than thirty (30) feet to my building, I proceeded to complete the alterations and improvements on my house at an expense of upwards of $200,000. It was not until March, 1902, that I learned that the tunnel was in fact being constructed on lines wholly different from those specified on the plans of the rapid transit commission and the diagram sent me by Mr. McDonald, and that, instead of the tracks being under the central part of the street, there were two tunnels, one on either side of the Metropolitan railroad tracks, and that the location of the eastern track had been moved twenty-seven (27) feet, or thereabouts, to the eastward of the point shown on said plans and diagram, and was, as I am informed, within seven (7) feet of the line of the foundation of my house, instead of over thirty (30) feet distant therefrom. This information I
49 derived from investigations made by engineers employed by myself and others to examine the tunnel after the occasion, in March last, when several houses on the east side of Park avenue, in the block below me, were undermined, and the front parts thereof fell down.

As I am informed and believe, this change in the route of the tunnel adjacent to my premises was made solely by the authority and direction of the chief engineer of the rapid transit railroad commission. It was never formally submitted to or adopted by the said board; no notice of such change was given to the public or to any

property holder, nor was it ever submitted to or approved by the court or any commission appointed by the court. Had I supposed that this tunnel at this point was to be constructed on the lines according to which it is now being built, I should certainly never have given my consent, and I should also have opposed such plans before the court and the commission, for the reason that I regard the plan as now being carried on to be one that is likely to seriously injure my property and render it both unsafe and undesirable to occupy. I am informed by the engineer employed by me to examine the premises that the present lines of the excavation bring the east wall of the tunnel as excavated to within two feet of the line of the foundation of my bay window, and, as already stated, within seven feet of the line of my foundation, and that any shifting, no matter how slight, is likely, at least, to cause serious cracks and possibly more grave danger. The soil in front of my house is of the same general character as that in front of the houses on the block below, where the recent accident has occurred. Moreover, my house is more than ordinarily susceptible to injury, in case of any caving in of the surface of the street, for the reason that as it fronts upon the side street, the beams of the house run from east to west instead of north and south; consequently should the front of the
50 house settle to any appreciable extent, it would have the effect of weakening or destroying the entire structure. As to the extent to which I shall be annoyed by the vibration caused by trains, I can, of course, form no accurate idea until the tunnel is constructed, but am satisfied that the chance of damage from vibration is very much increased by the change of the route of the tunnel to a point twenty-seven (27) feet nearer my house line than it was originally.

That the foregoing is a correct extract from said affidavit of Mr. Barney, and annexed hereto are true copies of the letter and map referred to in said affidavit.

FORSYTH WICKES.

Sworn to before me this 23rd day of August, 1902.

MORRIS U. ELY,
Notary Public, Kings County. [SEAL].

Ctf. filed in N. Y. Co.

51 *Copy of Letter Referred to in the Foregoing Affidavit.*

"NEW YORK, *April 10th*, 1901.

"Charles T. Barney, Esqr., 71 Broadway, New York, N. Y.

"DEAR MR. BARNEY: Your letter of the 9th inst. at hand, and in compliance with your request I send you a section of the rapid transit railroad, as it will be opposite your house—northeast corner of Park avenue and 38th street. In all probability the headings from 34th street and 41st street will meet at about 38th street, and I

would say that your location would not be reached at any rate, before January 1st, of next year.

"In reference to the matter of vibration I have, of course, no data as far as this work is concerned, but during the building and early operation of the tunnel in Baltimore, I made tests with a vibrating needle, the result of which showed that an ice wagon or beer truck running over the streets caused a greater vibration than a train of Pullman cars or coal cars running through the tunnel.

"I will be pleased to give you any further information that you may request.

"Sincerely yours,

"(Signed) JOHN B. McDONALD."

(Enclosure.)

(Here follows diagram marked p. 52.)

53 *Affidavit of Forsyth Wickes.*

Supreme Court, County of New York.

CHARLES T. BARNEY, Plaintiff,
against
THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS, ETC., Defendants.

STATE OF NEW YORK, *County of New York*, } ss.:

Forsyth Wickes, being duly sworn, deposes and says:

I am attorney at law in the office of Masten & Nichols, the attorneys for the plaintiff in the above action. I have examined a copy of the printed papers on the application for an order for the appointment of commissioners entitled "In the matter of the application of the Board of Rapid Transit Commissioners for the City of New York, for the appointment of three commissioners to determine whether a rapid transit railway or railways for the transportation of persons and property, as determined by said board, ought to be constructed and operated," which said printed papers were filed in the appellate division of the supreme court, first department, by Messrs. Parsons, Shepard & Ogden and Tracy, Boardman & Platt, the attorneys for said Board of Rapid Transit Cammissioners hereinafter referred to as the "board." Said printed papers contain copies of the resolutions
of said board of January 14th, and February 4th, 1897,
54 adopting routes and a plan of construction for the said rapid
transit railway which said routes and general plan of construction are particularly set forth therein. The copies of said resolutions annexed to the foregoing complaint and entitled "Schedule A," are correct copies of said resolutions as contained in the said printed papers examined by me. The said printed papers contain also a copy of the report of the said board to the common council of the city of New York, and the copy of said report annexed to the foregoing complaint entitled "Schedule B," is a correct copy of said report as contained in said printed papers examined by me. The said printed papers contain copies of the papers and form of consent enclosed by said board to property owners. The papers enclosed as aforesaid consisted of copies of the resolutions of said board of January 14th, and February 4th, 1897, together with a blank form of consent of which the following is a correct copy:

To the Board of Rapid Transit Commissioners for the City of New York:

Referring to the routes and general plan of construction adopted by said board on the 14th day of January, 1897, and the resolution of February 4th, 1897, and to the plans and conclusions trans-

mitted by said board to the common council of the city of New York, under date of February 4th, 1897, the undersigned, owner of property, known as —— in the city of New York, does hereby consent to the construction of a rapid transit railway in the city of New York, according to said routes, general plans of construction, plans and conclusions transmitted, as aforesaid, by the board of the common council of the city of New York.

Dated —— —, 1897.

55 (Form of acknowledgment.)

The circular, signed by the board and addressed to property owners (of which a copy is set forth at page 52 of said printed papers) contains the following statement: "The board is now seeking to ob-"tain, if possible, the consents of the property owners, along the line "of the routes, to the construction of the railway in accordance with "such plans and conclusions; and the board now asks you to con-"sent as one of such property owners."

I have also examined the record of the minutes of the meetings of said board, printed under its direction. The minutes of March 29th, 1902, on page 1438, contain a letter from William Barclay Parsons, chief engineer, to Hon. A. E. Orr, president of the board, dated March 29th, 1902, reporting upon the collapse of an eastern tunnel of the rapid transit railway beneath the east side of Park avenue between Thirty-seventh and Thirty-eighth streets. The following is a true copy thereof:

NEW YORK, *March* 29, 1902.

Hon. A. E. Orr, president rapid transit board.

SIR: In the prosecution of the work on section 4, in driving the east tunnel under Murray hill, a sliding of the rock composing the sidewall and roof has resulted in a damage to Nos. 51, 53, 55, 57, 59 and 61 Park avenue.

This fall of rock began at 6.10 p. m., on March 19, when a portion of the rock composing the east side of the heading roof in the east tunnel fell, followed shortly afterwards by strip of rock about 40 feet in length, 4 feet in height and 8 wide, sliding into the tunnel along the easterly line of the excavation on one of the beds forming a joint between the strata.

56 The subcontractor, Mr. Ira A. Shaler, at once concentrated his force and began putting in temporary supports to hold the roof from further slides. At 8 a. m. on March 21 the material, which was behind the rock that had previously fallen, broke away, crushing the timbers that had been put in, and making a hole which extended to the surface and into which the stoop and area of No. 55 Park avenue sank. The building department and a private firm of shorers were at once notified by the sub-contractor, who immediately began propping the front walls of No. 55.

At 1:45 p. m. on the same day the front wall of No. 55, as high up as the second story, fell, together with the stoop and portion of

the front wall of No. 57, and at 3:15 the rest of the front wall of No. 57, up to the second story, and the stoop of No. 59, followed. The break at the surface at that time extended from the north wall of No. 53 to the stoop of No. 59. There were a few small cracks in the fronts of Nos. 53 and 59.

At 5 p. m. on March 22 further cracks appeared in the front wall of No. 59, when steps were at once taken to support this building. On March 24 it was decided by the contractors to underpin the front walls of Nos. 51 and 61, which, up to that time, had not been damaged, except two small cracks in the front wall of the former, and to build beneath the front walls of these buildings a new foundation wall down to solid material. The slipping of the ground indicated that none of these buildings was founded on rock.

Since the accident the contractors have been engaged in shoring up the ground below so as to prevent any further caving in, in which they have been successful. The void caused by the caving in was filled with earth during the night of March 21 so as to prevent, as far as possible, any further movement of the ground
57 above. The work of shoring, underpinning and supporting the remaining walls and roofs of the tunnel has been in active progress both night and day, and so far has been successful in restricting the damage to the above-described buildings. The care of the buildings themselves since the accident has been under the jurisdiction of the department of buildings.

Very truly yours,

(Signed) WM. BARCLAY PARSONS,
Chief Engineer.

The said minutes of March 29th, 1902, also contain a statement of certain question- addressed to said board by F. W. Devoe representing certain property owners along the line of Park avenue, among which were the following:

"(2.) Why was the location of the easterly tunnel changed?

"(3.) How far has it been shifted from its original position?

"(4.) Has the westerly tunnel been changed and to what extent?

"(5.) Was the change of position of the easterly tunnel previously approved by the rapid transit commissioners, as required by the construction contract, and, if so, at what date?

"(18.) It is stated by the engineer that the easterly side of the easterly tunnel is about eight feet from the line of the house foundations. Was this near approach to the foundations of buildings known and approved by the rapid transit commissioners?"

The minutes of April 10th, 1902, contain a statement addressed to Hon. Alexander E. Orr, president of the board, and signed by Messrs. Parsons, Shepard & Ogden, Messrs. Boardman, Platt & Soley and Mr. William Barclay Parsons (being respectively the counsel and chief engineer of said board), purporting to be in
58 answer to the questions above referred to, and in the course of said written statement occurs the following:

"18. * * * This particular near approach to a position verti-

cally under the foundations of buildings was not specifically known to or approved by the rapid transit board and for the reason that it was one of a vast number of details with which it is quite impossible for the board to deal, except by trusting them to high-class experts."

Also the following:

"2, 3, 4 and 5. There has been no change in the routes or general plan, or of the contract between the city and the rapid transit contractor with respect to either division of the tunnel under Park avenue. The routes and plan, and the contract allowed the contractor and the engineers reasonable latitude in determining the precise position of any part of the tunnel so that it might accord with the necessities of stations, curves and other local conditions. Among other local conditions on Park avenue is the ultimately anticipated connection of the rapid transit system with the Grand Central station facilities which must, of course, be accomplished without grade crossings. This would include the anticipated extensions of the rapid transit system north to serve the section of the city lying east of Central park. The positions originally given for the tunnel, or both of its sections, were typical and subject to reasonable variations as expressed above. The contractor claims that the matter is largely one for engineering experts; and it is the clear opinion of the contractor and his engineers, as well as the engineer of the board, that the easterly section of the tunnel substantially conforms with the
59 original requirements. The same is true of the westerly section of the tunnel. No modification of the construction contract has been made; and in the opinion of the engineers with whom, in the execution of the work, the determination of technical problems must naturally rest, both sections of the tunnel have been placed according to the fair requirements of the contract."

It appears from said minutes, page 146, that the statement from which the foregoing extracts are made was sent to Mr. Devoe, as the answer of the board to the questions submitted to him as aforesaid.

I have also obtained from the office of the engineer of the said board copies of the drawings described in the resolutions of the said board of January 14th and February 4th, 1897, as "Drawings 1 to 60;" also the copies of the drawings, entitled "Contract drawings A1 to A35," and "C1 to C36," being a part of the drawings prepared in connection with the contract between the board and John B. McDonald, entitled "Contract for construction and operation of rapid transit railroad, with supplementary agreements, dated February 21st, 1900," and referred to in chapter 2, page 56, of the aforesaid contract; also copies of the contract, entitled "Contract for construction and operation of rapid transit railroad, with supplementary agreements, and dated February 21st, 1900," and said copies so obtained by me are the copies that have been used in the preparation of the papers in this action.

The minutes of April 10, 1902, contain a statement addressed to Hon. Alexander E. Orr, president of the board and signed by Messrs.

Parsons, Shepard & Ogden, Messrs. Boardman, Platt & Soley and Mr. William Barclay Parsons (being respectively the counsel and chief engineer of the board) purporting to be in answer to the questions above referred to. In the course of said statement occurs the following:

"(8.) The rapid transit contract between the city and Mr.
60 McDonald has not been assigned so far as the board is advised. The consent of the board is necessary to the validity of the assignments, and the board has given no consents."

"(13, 14, and 15.) The rapid transit board has not exacted any security from the sub-contractor; nor is the city in any way concerned with such security, except only that the city has taken from its own contractor, Mr. McDonald, an assignment of all the sub-contractor's bonds as additional security to the city for the performance of the rapid transit contract. The board, in behalf of the city, required from the contractor a bond for construction and equipment in the penal sum of $5,000,000, and also a "continuing bond" in the penal sum of $1,000,000. The condition of the latter bond is that the contractor shall "faithfully perform all the conditions, covenants and requirements" specified in the contract. The contractor has also deposited with the city the sum of $1,000,000, which the contract provides shall be security "for the faithful performance by the contractor of all the covenants, conditions and requirements specified and provided for in the agreement for construction." These securities aggregate in amount $7,000,000. In addition the contract provides that the city shall have a first lien upon the entire equipment of the railroad to be provided by the contractor, such lien to be "further security for the faithful performance by the contractor of the covenants, conditions and agreements" of the rapid transit contract. The contractor by such contract has covenanted with the city that the plans and specifications and other provisions of the contract, if the work be done without fault or negligence on the part of the contractor, do not involve any danger to the foundations, walls or other parts
of adjacent buildings or structures. And the contractor
61 further covenants that he will at his "own expense make good any damage that shall in the course of construction be done to any such foundations, walls or other parts of adjacent buildings or structures." This provision makes it clear in our opinion that the contractor is bound to make good all harm done *to the buildings on Park avenue*. The contract further provides that the contractor is bound to complete the entire work upon every section of the road "with the highest regard to the safety of life and property." The contract further provides that "the sidewalks, curbs, areas and stoops along the line of the work must also be protected from any injury; but should any injury occur to any sidewalk, curb, area or stoop, the contractor shall fully restore the same to as good a condition as existed before the injury was done." The contract further provides that "in case any claim shall be made by any person or corporation against the city for loss or damage to person or prop-

erty caused by any negligence, fault, or default of the contractor, the comptroller shall, upon the requirement of the board, deduct from any moneys due or becoming due to the contractor the amount of the claim as security for its payment.

"We have no reason to suppose that the contractor or sub-contractor will for a moment fail in willingness or readiness to make good the damage done to the Park Avenue proprietors by the recent accident. But if the contractor or sub-contractor shall fail to make good such damage, the provision of the contract, the securities mentioned above and the moneys which may be withheld by the city from the contractor, in our opinion assure beyond any possible doubt the payment of all proper claims."

"(1, 17, 18, and 20.) The rapid transit board has done
62 everything within its power to prevent further injury to the buildings on the east side of Park avenue between Thirty-seventh and Thirty-eighth streets. All of these buildings are now in charge of the building department. The board believes the tunnel underneath to be safe. For abundant caution all work has for some time been suspended except the construction of permanent masonry lining and the placing of additional temporary supports. The whole situation is being examined by engineering experts."

On or about the 18th day of June of this year, a so-called taxpayer's action (under chapter 531 of the Laws of 1881 as amended) was instituted in the supreme court for New York county by Charles T. Barney against the said board, the members thereof as commissioners of rapid transit, John B. McDonald and Ira A. Shaler.

The bill of complaint in the present suit and the supporting affidavits, so far as they set forth the departure of the plan of construction of the said rapid transit railway as now being carried on under Park avenue from the routes and general plan as contained in the said resolutions of January 14th and February 4th, 1897, are substantially identical with the papers in that action. I have examined the affidavits submitted by the defendants in said action in opposition to a motion for a preliminary injunction therein and ascertained that the facts set forth in the plaintiff's said papers are practically undisputed. No decision on that motion has yet been handed down. The affidavit of William Barclay Parsons, Esq., chief engineer of the said board, contains the following statements with regard to the modification of the plan of construction under Park avenue:

"I understood that the board approved of that mode of construc-
63 tion on Park avenue. My directions were given without any notice to the board or consultation with it. I believed and assumed that so long as the tunnel and its various sections were kept within the central part of the street bounded on each side by a line parallel with and five feet distant from the side, the precise location was a mere matter of engineering to be determined by myself as the expert in chief part for the rapid transit board with due regard to all the various requirements of the problem.

"The routes and general plan contain a drawing for a part of the

route under Park avenue showing three tunnels or sections of tunnel with a tunnel width out to out of at least 65 feet. A cross-section on this plan is annexed to this report as Exhibit A. The written description contained in the general plan, describing the construction for the part of the route in question, permitted a width of 65 feet in the clear. Of the three tunnel sections, the center one was originally intended to contain two tracks, and was located beneath the Metropolitan tunnel, while the outer ones were originally intended to contain one local track each. But this was tentative or illustrative only, and was not intended to limit the engineer's choice of the most eligible location so long as the structure did not reach within five (5) feet of the house line on either side, and as long as the aggregate widths of the tunnel sections in the clear did not exceed sixty-five (65) feet. When the time came to prepare the contract drawings, it was decided to build two instead of three tunnel sections, each section to contain two tracks, and each to have a width in the clear of 24 feet, and a total over-all width of 27 feet each, or a total occupation of street of 54 feet. It was proposed to separate these sections by a core of rock and masonry of 17 feet in
width. This intermediate space could have been utilized for
64 any purpose to which subsurface space is put, such as an additional subway track, or a double decking of the Metropolitan tunnel, or the laying of a sewer, gas or water main, or similar structure." (Fols. 27 to 29.)

And again Mr. Parson- states that the exterior wall of the tunnel where the caving-in occurred upon the easterly side of Park avenue will be four feet in thickness, and continues:

"Even at this point the back of the wall will be six feet from the building line, so that the provision of the general plan that the tunnel shall not approach within five feet of the building line has been followed." (Fol. 34.)

S. L. F. Deyo, Esq., chief engineer of the said Rapid Transit Construction Company, states in his affidavit as follows:

"As I understand the matter, Mr. Parsons began studying the situation with a view to so changing the detail at that point as to enable the connections above mentioned to be made without the necessity of grade crossings, and in order to accomplish this, I am informed that the detail of construction was altered in that the tunnel sections on Park avenue were separated so as to permit of three inside depressed tracks running into the Grand Central station. This plan placed the easterly tunnel section as it is now building. After such change in detail was made, Mr. Parsons sent an altered drawing to me with directions that the road should be built as laid down upon such altered drawings." (Fols. 9–10.)

The affidavit of Alexander E. Orr, president of the said board,
states that at a meeting of the board held on June 25th, 1902,
65 "in order to put beyond any doubt the view of the board with respect to the mode of construction under Park avenue, the board, with the concurrence of the mayor and comptroller of the city, formally adopted resolutions as follows:

"Whereas, the chief engineer has reported to this board that the rapid transit tunnel under Park avenue between 34th and 42nd streets has been and is being constructed by the contractor John B. McDonald, in two divisions, a westerly and an easterly division, of which the construction and the location are shown upon a plan and drawings this day submitted to the board entitled 'Park Avenue construction, plans submitted to the Board of Rapid Transit Railroad Commissioners, 25th June, 1902,' and filed with the secretary; and

"Whereas, the chief engineer has stated to the board the necessity and reason for the construction of such part of the rapid transit tunnel in the manner shown by such plan and drawings and it appears from the report of the chief engineer that the construction of the portion of the tunnel between 34th and 42nd streets is in much the larger part actually completed according to such plan and drawings; and

"Whereas, the city has already in large part paid for such construction of such portion of the said rapid transit tunnel.

"Now, therefore, it is

"Resolved, That this board approve and confirm the details of the mode of construction and location of the said tunnel under Park avenue between 34th and 42nd streets as shown by such plan and drawings so submitted by the chief engineer and directs that such construction be completed in accordance with such plan and drawings." (Fols. 15–17.)

66 This affidavit is made in support of an application for a writ of injunction enjoining and restraining the defendants and each of them, their agents and servants and all persons claiming under or through them during the pendency of this action from excavating or blasting or doing any act toward the construction of a rapid transit railway in the said Park avenue, and for such other and further relief as to the court may seem proper.

FORSYTH WICKES.

Subscribed and sworn to before me this 23d day of August, 1902.

MORRIS U. ELY,
Notary Public, Kings County. [SEAL.]

Certificate filed in N. Y. Co.

67 (Endorsed:) Circuit court of the United States, in and for the southern district of New York.—Charles T. Barnet, complainant, against The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, defendants.—Bill of complaint and affidavits.—Masten & Nichols, solicitors for com-

plainant, 49 Wall St. borough of Manhattan, city of New York.—U. S. circuit court, southern district of New York, Filed Aug. 25, 1902, John A. Shields, clerk.

68 Circuit Court of the United States in and for the Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, and May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, Defendants.

Whereas, in the above-named cause it has been made to appear upon the verified bill of complaint and the schedules annexed thereto, and the affidavits of Forsyth Wickes and of Anderson H. Tyson, filed herein, that a writ of injunction preliminary to the final hearing is proper and that *prima facie* the complainant is
69 entitled thereto, enjoining the defendants herein from the acts complained of and threatened to be committed;

Now, on motion of the complainant, it is ordered that the defendants appear before a judge of this court at room 124 in the Post-office building in the borough of Manhattan in the city of New York upon the 3rd day of September, 1902, at 12 o'clock noon of said day, and then and there show cause, if any they have, why the preliminary injunction therein prayed for should not issue, and it appearing to the undersigned circuit justice of the second circuit that there is danger of irreparable injury being caused to the plaintiff before the application for the said preliminary writ of injunction can be heard, unless the said defendants, pending such hearing, be restrained as hereinafter set forth:

Now, therefore, it is ordered, that you, the said City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. MacDonald, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, defendants herein, and each of you, your agents and servants, and all persons claiming under or through you, be and you hereby are specially restrained and enjoined until the further order of this court, from excavating or blasting or doing any act toward the construction or completion of a rapid transit railway in the borough of Manhattan of the said city of New York, under or upon Park avenue in the easterly half thereof in front of the complainant's premises at the northeast corner of Park avenue and 38th St.

It is further ordered that a copy of this order, certified unto by the hand of the clerk and seal of this court, be served on each of the defendants to be restrained thereby.

Dated August 23rd, 1902.

E. HENRY LACOMBE,
Circuit Justice of the Second Circuit.

(Endorsed:) Circuit court of the United States, in and for the southern district of New York.—Charles T. Barney, complainant, against The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased.—Defendants.—Restraining order and order to show cause.—Masten & Nichols, solicitors for complainant, 49 Wall street, borough of Manhattan, city of New York.

I hereby certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within restraining order and order to show cause upon Charles E. Fraser, engineer in charge of the rapid transit work from 34th street to 41st street on the east side of Park avenue, — the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within restraining order and order to show cause upon the within-named defendant Board of Rapid Transit Railroad Commissioners for the City of New York, by exhibiting to Robert H. Hutchins, managing clerk for Parsons, Shepard & Ogden, attorneys for said board, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at the city of New York, in my district, I served the within restraining order and order to show cause upon the within-named defendant John B. McDonald by exhibiting to De Lancey Nicoll, of the firm of Nicoll, Anable & Lindsay, attorneys for said defendant, the within original and at the same time leaving with him a copy thereof.

I further certify, that on the 25th day of August, 1902, at
71 the city of New York, in my district, I served the within restraining order and order to show cause upon the within-named defendant May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, by exhibiting to Charles P. Howland, of the firm of Howland, Murray & Prentice, as attorneys for said defendant, the within original and at the same time leaving with him a copy thereof.

WILLIAM HENKEL,
United States Marshal, S. D. N. Y.

New York, August 25th, 1902.

U. S. circuit court, southern district of New York, Filed Aug. 26, 1902, John A. Shields, clerk.

72 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY
vs.
RAPID TRANSIT COMMISSIONERS ET AL.

LACOMBE, *C. J.:*

The stay heretofore granted is vacated—see opinion in Huntington case.

August 27, 1902.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—Barney *vs.* Rapid Transit Commissioners.—Memo. opinion,—Lacombe, J.—U. S. circuit court, southern district of New York, Filed Aug. 28, 1902 , John A. Shields, clerk.

73 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the United States court house and post office building, in the county of New York, on the 11th day of November, 1902.

Present: Hon. E. Henry Lacombe, United States circuit judge.

CHARLES T. BARNEY
versus
THE CITY OF NEW YORK, THE BOARD OF RAPID TRANSIT Railroad Commissioners for the City of New York, *et al.*

Upon reading the order, entered herein on the 15th day of October, 1902, dismissing the bill of complaint herein, and upon all the papers and proceedings upon which the said order was granted, and upon all the other proceedings herein, and upon the certificate of the Hon. E. Henry Lacombe, United States circuit judge, granted pursuant to the second paragraph of the fifth section of the act of Congress, approved March 3rd, 1891, and entitled, "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes;" and upon reading and filing the defendants' notice of motion herein, dated the 3rd day of November, 1902, for an order resettling the form of the said certificate, and after
74 hearing Edward M. Shepard, Esq., in support of the said motion, and Arthur H. Masten, Esq., in opposition thereto, and due deliberation having been thereupon had, it is

Ordered that the said certificate be, and the same hereby is, resettled and modified, so that the same shall read as follows:

"United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants.

A final decree having been entered herein on the 14th day of October, 1902, dismissing this suit and the bill of complaint therein:

Now, therefore, this court in pursuance of the second paragraph of the fifth section of the act of Congress, approved March 3, 1891, and entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause, as follows:

Is this court without jurisdiction of this cause for the reason that the acts of the defendants in building and constructing the easterly portion of the tunnel in Park avenue in the city of New York were not acts of the State of New York, to which the prohibition of the fourteenth amendment of the Constitution of the United States, which provides that no State shall 'deprive any person of life, liberty or property without due process of law' has application?

E. HENRY LACOMBE,
U. S. Circuit Judge."

Nov. 11th 1902.

E. HENRY LACOMBE, *U. S. C. J.*

75 Please take notice that a proposed order, of which the within is a copy, will be presented for settlement to the Hon. E. Henry Lacombe, at his chambers in the United States court house and post office building in the county of New York, on the 11th day of November, 1902, at 4 o'clock in the *fore*noon.

Dated, New York, November 10th, 1902.

EDWARD M. SHEPARD,
BOARDMAN, PLATT & SOLEY,
Solicitors for the Defendants, Board of Rapid Transit Railroad Commissioners and Others, 26 Liberty Street, New York City, N. Y.

To Messrs. Masten & Nichols, solicitors for complainant. Hon. George L. Rives, corporation counsel, solicitor for def't The City of New York.

[Endorsed:] U. S. circuit court, southern district of New York. Charles T. Barney *versus* The City of New York, The Board of Rapid Transit Railroad Commissioners for the City of New York, *et al.* Order, with notice of settlement. Original. Edward M. Shepard, Boardman, Platt & Soley, solicitors for def't The Board of Rapid Transit R. R. Commissioners for the City of New York, *et al.*, 26 Lib-

erty street, New York city. A copy of the within paper has been this day received at the office of the corporation counsel. Nov. 11, 1902. George L. Rives, corporation counsel. Due and timely service of the within proposed order with notice of settlement is hereby admitted this 11th day of November, 1902. —— ——, solicitors for complainant. U. S. circuit court southern district New York Filed Nov. 11 1902 John A. Shields, clerk. Copy this day received Nov. 11 1902 Masten & Nichols.

76 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants. } Petition for Appeal.

To the United States circuit court for the southern district of New York:

Your petitioner, Charles T. Barney, respectfully represents that he is aggrieved by the final decree entered in this cause on the 14th day of October, 1902, dismissing this suit and the bill of complaint therein, on the ground that this court had no jurisdiction of this cause.

Your petitioner therefore prays an appeal from said final decree of October 14th, 1902, to the Supreme Court of the United States, under the second paragraph of section 5 of the act of Congress approved March 3, 1891, and entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," and files herewith an assignment of error and prays that his appeal may be allowed and a supersedeas granted to the end that the said final decree herein of October 14th, 1902, may be reviewed and reversed.

October 17th, 1902.

MASTEN & NICHOLS,
Solicitors for Complainant and Petitioner,
49 *Wall Street, New York.*

77 (Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, against The City of New York, etc. defendant.—Petition for appeal.—Masten & Nichols, solicitors for complainant, No. 49 Wall St. Manhattan, city of New York.—U. S. circuit court, southern district of New York, Filed Oct. 17, 1902, John A. Shields, clerk.

78 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants.

Charles T. Barney, the complainant above named, conceiving himself aggrieved by the final decree entered herein on the 14th day of October, 1902, dismissing the suit and the bill of complaint therein, does hereby appeal from said decree to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said appeal was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York city, October 14th, 1902.

MASTEN & NICHOLS,
Solicitors for Complainant and Appellant,
49 Wall Street, New York.

And now, to wit, on October 17th, 1902, it is ordered that the appeal be allowed as prayed for.

E. HENRY LACOMBE,
United States Judge.

(Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, *vs.* The City of New
79 York, etc., defendants.—Order allowing appeal. Masten & Nichols, solicitors for complainant, 49 Wall St. Manhattan, New York city.—Received this 18th day of October, 1902, a copy of the within order allowing appeal, service of which is hereby admitted. Howland, Murray & Prentiss, att'ys for def't Shaler.—Copy received Oct. 18, 1902, Boardman, Platt & Soley, per J. T. C.—Copy received Parsons, Shepard & Ogden, Oct. 18, 1902.—A copy of the within has this day been received. Oct. 18, 1902, Nicoll, Anable & Lindsay.—A copy of the within paper has been this day received at the office of the corporation counsel. Oct. 18, 1902, George L. Rives, corporation counsel.—U. S. circuit court, Filed Oct. 18, 1902, John A. Shields, clerk.

80 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants.

Now comes Charles T. Barney, by his solicitors Masten & Nichols, and prays an appeal to the Supreme Court of the United States from the final decree entered herein on the 14th day of October, 1902, and

says that in the record and proceedings in this cause there is manifest error, in this:

That the circuit court of the United States for the southern district of New York erred in entering the said final decree upon its own motion, upon the ground that it was required to dismiss this cause, because it appeared to its satisfaction that this suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, for the reason that the acts of the defendants in building and constructing the easterly portion of the subway tunnel in Park avenue, in the city of New York, were not the acts of the State of New York, but were the individual acts of the defendants to which the prohibitions of the fourteenth amendment of the Constitution of the United States had no application.

Wherefore, the said Charles T. Barney prays that the said
81 decree of this court, dated October 14th, 1902, be reversed and that this cause be remanded for such further proceeding as equity and justice may require.

MASTEN & NICHOLS,
Solicitors for Complainant and Appellant,
49 *Wall Street, New York.*

(Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, *vs.* The City of New York, etc. defendants.—Assignment of errors.—Masten & Nichols, solicitors for complainant, 49 Wall street, Manhattan, New York city. U. S. circuit court, southern district of New York. Filed Oct. 17, 1902, John A. Shields, clerk.

82 United States Circuit Court, Southern District of New York.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, ETC., Defendants. } Bond on Appeal.

Know all men by these presents, that we, Charles T. Barney, as principal, and The American Surety Company of New York, of 100 Broadway, borough of Manhattan, New York, as surety, are held and firmly bound unto The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as executrix of the estate of Ira A. Shaler, deceased, in the full and just sum of five hundred (500.) dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of October, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States for the southern district of New York in a suit in equity pending in said court between Charles T. Barney, complainant, and The City of New
York, Board of Rapid Transit Railroad Commissioners for
83 the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as executrix of the estate of Ira A. Shaler, deceased, defendants, a final decree was entered against the said Charles T. Barney, dismissing said suit with costs, and the said Charles T. Barney having appealed from said final decree and his appeal having been allowed, and the said Charles T. Barney having filed a copy thereof, together with an assignment of errors in the clerk's office in the said court to reverse the final decree in the aforesaid suit, and a citation directed to the defendants therein citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the 30th day of November, 1902.

Now the condition of the above obligation is such that if the said Charles T. Barney shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation be void, else to remain in full force and effect.

This is a bond to operate as a supersedeas.

CHARLES T. BARNEY. [SEAL.]

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,

By DAVID B. SICKELS, *Vice President.*

SAMUEL S. PERRY, *Attorney.*

Sealed, executed and delivered in the presence of
FORSYTH WICKES.

84 STATE OF NEW YORK, }
County of New York, } ss:

On this 17th day of October, 1902, before me personally appeared Charles T. Barney, to me known and known to me to be the individual who executed the foregoing instrument, and he acknowledged to me that he executed the same for the uses and purposes therein set forth.

FORSYTH WICKES,

[SEAL.] *Notary Public, No.* 141, *New York County.*

STATE AND COUNTY OF NEW YORK, ss:

On this 17th day of Oct. 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose

and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Samuel S. Perry, and knew him to be one of the attorneys of said corporation, that the signature of said Samuel S. Perry subscribed to the said instrument,
85 is in the genuine handwriting of the said Samuel S. Perry and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

[SEAL.] MARSHALL L. BROWER,
Notary Public, New York County.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted.

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Samuel S. Perry, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and
86 do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 17th day of Oct. 1902.

[SEAL.] SAMUEL S. PERRY, *Attorney.*

(Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendants of the right at any time to examine the proper officers of the surety company under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Oct. 17, 1902, John A. Shields, clerk.

87 UNITED STATES OF AMERICA, *ss:*

To the City of New York, etc., etc., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the 13th day of November, next pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the southern district of New York, wherein Charles T. Barney is appellant and you are appellees, to show cause, if any there be, why the final decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of October, in the year of our Lord one thousand nine hundred and two.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) United States circuit court, southern district of New York.—Charles T. Barney, complainant, *vs* The City of New York, etc. defendants.—Citation.—Masten & Nichols, solicitors for complainant, 49 Wall St. Manhattan, New York.—Received this 18th day of October, 1902 a copy of the within citation service of which is hereby admitted. Howland, Murray & Prentiss, att'ys for def't Shaler.—Copy received, Oct. 18, 1902, Boardman, Platt &
88 Soley, per J. T. C.—Copy received. Parsons, Shepard & Ogden, Oct. 18, 1902.—A copy of the within has this day been received. Oct. 18, 1902. Nicoll, Anable & Lindsay. A copy of the within paper has been this day received at the office of the corporation counsel. Oct. 18, 1902, George L. Rives, corporation counsel. U. S. circuit court, southern district of New York, Filed Oct. 18, 1902, John A. Shields, clerk.

89 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled Charles T. Barney, complainant-appellant, *vs.* The City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit; John B. McDonald, May L. Shaler, as administratrix of the estate of Ira A. Shaler, deceased, defendants-appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 12th day of November, in the year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

90 [Endorsed:] United States circuit court of appeals for the second circuit. Charles T. Barney, appellant *vs.* The City of New York *et al.* appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

91 Circuit Court of the United States in and for the Southern District of New York.

ARABELLA D. HUNTINGTON, Complainant, *against* THE CITY OF NEW YORK, BOARD OF RAPID Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, and The Rapid Transit Subway Construction Company, Defendants.	In Equity. No. —.

STATE OF NEW YORK, *County of New York, Southern District of New York,* } *ss.:*

Alexander E. Orr, being duly sworn, says: I am a member of the Board of Rapid Transit Railroad Commissioners for the City of New York (hereinafter called the board), and have been since its
92 reorganization in 1894, with the exception of a few days between the termination of my membership therein as president of the Chamber of Commerce and my reappointment as a permanent member of the board. Except during that time and for a few days thereafter, I have been president of the board from 1894. I have given to the rapid transit problem of the city very large and continuous attention since 1894; and before that time I was greatly interested in it.

The location of the easterly tunnel section under Park avenue of the rapid transit railroad now in course of construction, of which the plaintiff complains in this suit, is, in my opinion, necessary to

the connection with the Grand Central station required by the present routes and general plan of the railroad, and, besides, is necessary to the suitable east side extension of the railroad. I shall speak first of such east side extension.

In 1895 the board adopted routes and general plan for a rapid transit railway in the boroughs of Manhattan and the Bronx, then forming the city of New York. Such routes were intended to provide a general and systematic scheme, the route extending from South Ferry along Broadway to 14th street, where the route subdivided into an easterly and westerly line, the easterly line following Fourth avenue and Park avenue to the Harlem river, and thence across the Harlem river; and the westerly line following Broadway and the Boulevard to Fort George near 186th street on the west side. The board then deemed an east side line to be essential north of 42nd street, and such a line between 42nd street and the Harlem river was to be placed underneath the tracks of the New York Central & Hudson River railroad. The appellate division of the supreme court of the State of New York refused its approval to such routes and general plan, on the ground that the expense of construction might exceed the pecuniary ability of the city or the limit of expense for rapid transit prescribed by law. Thereupon, and in 1897, the board adopted new routes and general plan for the rapid transit railroad which is now under construction and is referred to in the bill of complaint in this suit. The main line of such route extends from
93 the city hall northerly, following Fourth avenue from 14th street to Park avenue, and thence following Park avenue to 42nd street, thence turning to the west to Broadway and following Broadway and the Boulevard northerly to 103rd street, where the route divides into an easterly and a westerly line. The more easterly of the two lines follows Lenox avenue (being near the central north and south line of that portion of the borough of Manhattan) northerly to and beyond the Hudson river. It will be perceived that the routes and general plan of the road now under construction do not include a line on the easterly side of the borough of Manhattan between 42nd street and the Harlem river, where is gathered a very large population. The absence of such a provision in the routes and plan was deeply regretted by the board as a serious defect made necessary by the limit upon expenditure and by the determination of the appellate division. The board has, however, ever since had it in contemplation that before long the necessity of an east side line would be recognized and provision for its construction would be made. The routes and general plan for such an east side line are now in course of preparation under the formal direction of the board, and its adoption by the board will depend only upon the pecuniary provision which the city shall be able and willing to make for rapid transit. In my opinion, and that of the board, such a line must join the line of the present road at or near the junction of 42nd street and Park avenue. The map of the city and of its rapid transit systems put that proposition beyond reasonable doubt. And, moreover, at that point is situate the

Grand Central station, which is the most important point within the city of New York for the receipt and distribution of incoming and outgoing passenger traffic. The total amount of such traffic there is vast.

In devising the present routes and plan the board provided for "suitable tracks and connections from the portion of the route "near the corner of Park avenue and 42nd street to the yard and "tracks of the Grand Central station," and that "all of the tracks "and connections last mentioned shall be under Park avenue
94 "and 42nd street and private property." The entrance of the New York Central & Hudson River railroad, the Harlem railroad and the New York, New Haven & Hartford railroad into the Grand Central station and the vast traffic they bring, make it a matter of very great consequence to the traveling public and to the interests of the city at large that there should be easy communication between the rapid transit system now under construction and the tracks of those three railroads at the Grand Central station. They now do a very important and growing intra-urban business on the east side of the city, as well as a suburban business which is of large consequence to the growth and development of the city and of very great importance to the traveling public. The board from its original consideration of any rapid transit plan deemed it to be important that, as soon as the views of the proprietors of the three railroads should permit, the very best kind of connection between the four tracks of the rapid transit railroad on Park avenue and the tracks of the Grand Central station should be made. For that reason the provision above referred to was inserted in the routes and general plan. Such connections or portions thereof could also, as I have pointed out, be used for the initial part of the eastern extension of the rapid transit railroad from 42nd street and Park avenue.

Prior to March, 1902, the board had adopted no formal resolutions with reference to the precise arrangement of details of the tracks and connections between the route on Park avenue and the Grand Central station. That matter, so far as preparation for it could be made in advance of a definite arrangement with the proprietors of such three railroads, was left to the chief engineer of the board as an expert matter.

It is clear beyond any reasonable doubt that the connections between the four tracks on Park avenue and the tracks of the Grand Central station must be made without grade crossing. Neither public safety nor public sentiment, nor the opinion of the board, would for a moment permit grade crossings at so critical a point of the rapid transit system as the section of the road curving from Park
95 avenue into 42nd street. In my opinion, and in the opinion of the board, the detail of construction on Park avenue which was followed by the chief engineer of the board and assented to by the chief engineer of the contractor and of the Subway Construction Company, were proper and necessary for a safe and efficient connection with the yard and tracks of the Grand Central station, and also for the proposed east side line. The necessary avoidance of grade

crossing involves having seven separate tracks immediately below 42nd street whenever the connection shall be complete. Such avoidance of grade crossing requires that three tracks shall be depressed so as to pass under other tracks, and that those three tracks shall leave the main line tracks coming from the south of Park avenue at a sufficient distance southerly from 42nd street to permit them to be sunk upon proper grades below the tracks under which they must pass.

The attention of the board was particularly drawn to the mode of construction under Park avenue by the accident in the easterly section of the Park Avenue tunnel occurring on 21st March last. A committee of owners of property on Park avenue which was formed to take care of their interests in the matter was received and heard by the board, and addressed to the board a series of questions, some of which are quoted in the affidavit of Gordon M. Buck, included in the complainant's moving papers. The board submitted the questions to its chief engineer and its attorneys and counsel, who, on April 10th, 1902, reported answers to such inquiries. Certain of the answers are correctly stated in such affidavit of Mr. Buck (pp. 51 and 52 of plaintiff's printed moving papers). The answers were transmitted by me to such committee of Park Avenue property owners. The said committee has not expressed to the board or to myself any dissatisfaction with the answers. No further complaint or protest has been received by the board from any member of that committee, and no owner of any property on Park avenue, whether or not represented by such committee, has begun any proceedings or made any protest against the continuance of the work according to the plans now being followed, except only the complainant
96 and one Frederick W. Devoe and one Charles T. Barney.

The said Charles T. Barney began a suit in the supreme court of the State of New York on or about the 18th day of June, 1902. The said Devoe has not begun any suit.

The complainant's premises, on account of which she brings this suit, were conveyed to her on or about the 11th day of July, 1884, by Collis P. Huntington, by deed, a certified copy of which is hereto annexed. This I state upon my information and belief, such information having been given me by such copy of such deed and by the attorneys for the Board of Rapid Trans't Railroad Commissioners. As I am advised by counsel for the said board, Edward M. Shepard, and as I verily believe, the said deed conveyed no part of the fee of Park avenue as the said avenue now exists with its width of 140 feet. As I am informed and believe, the said avenue has so existed with such width of 140 feet and with its easterly and westerly building line in their present positions for upwards of fifty years. As I am informed and believe, the house upon the complainant's premises was built very many years ago, having its easterly side on Park avenue upon the said easterly building line of the avenue as the same has so existed for upwards of fifty years. During such fifty years the said Park avenue, with its width of 140 feet as at present, has been continuously used by the public as one

of the streets of New York. Nor, so far as I know or have heard, has any claim that any part thereof belonged in fee to the complainant or any other abutting owner been ever made, until the claim was made by the complainant in this suit.

At a meeting of the board held on 25th June, 1902, in order to put beyond any doubt the view of the board with respect to the mode of construction under Park avenue, the board, with the concurrence of the mayor and comptroller of the city, formally adopted resolutions as follows:

Whereas, the chief engineer has reported to this board that the rapid transit tunnel under Park avenue between 34th and 42nd streets has been and is being constructed by the contractor,
97 John B. McDonald, in two divisions, a westerly and an easterly division, of which the construction and location are shown upon a plan and drawings this day submitted to the board entitled "Park Avenue construction, plans submitted to the Board of Rapid Transit Railroad Commissioners, 25th June, 1902," and filed with the secretary; and

Whereas, the chief engineer has stated to the board the necessity and reason for the construction of such part of the rapid transit tunnel in the manner shown by such plan and drawings and it appears from the report of the chief engineer that the construction of the portion of the tunnel between 34th and 42nd streets is in much the larger part actually completed according to such plan and drawings; and

Whereas, the city has already in large part paid for such construction of such portion of the said rapid transit tunnel,

Now, therefore, it is

Resolved, That this board approve and confirm the details of the mode of construction and location of the said tunnel under Park avenue between 34th and 42nd streets as shown by such plan and drawings so submitted by the chief engineer and directs that such construction be completed in accordance with such plan and drawings.

In the opinion of the board, and in my opinion, it is beyond doubt that whatever shall be the result of this suit, it will be necessary for the proper rapid transit development of the city that the easterly section of the tunnel on Park avenue of which the plaintiff complains shall remain part of its rapid transit system. If such section were to be now closed and filled in it would in the future, and a future not remote, need to be reopened and reconstructed. If the court were to require the present abandonment of such section it would be necessary to excavate Park avenue for another tunnel section lying to the west. As I am informed by the chief engineer, and believe, the construction of such another section would involve very large expense, not less than six hundred thousand dollars ($600,000), without including the cost of filling up the present eastern tunnel section of which the plaintiff complains. It would, as I am
98 informed by the chief engineer, and believe, involve a prolongation of the period of excavation and construction on

Park avenue of as much as eighteen months, and would involve a delay in the completion and commencement of operation of the rapid transit railroad for as much as one year. The loss and inconvenience to the city and to the traveling public which this would involve would be enormous.

The city of New York has already invested upwards of sixteen million dollars ($16,000,000) in the construction of the rapid transit railroad described in the complainant's bill. I am informed by William Barclay Parsons, the chief engineer of the rapid transit board, and I verily believe, that the construction of a new easterly tunnel section on Park avenue such as would be necessary if the restraining order issued by this court was continued, would seriously delay the completion of the railroad. The railroad is by far the most important public work now under construction in the city of New York. Its total cost, exclusive of equipment will be more than thirty-seven million dollars. Its completion involves enormous considerations of public convenience.

There will be submitted with this affidavit a true copy of the contract between the city and the defendant McDonald, made on 21st February, 1900.

As I am informed and believe, the construction of the easterly tunnel section as it is now proceeding, and as it was proceeding at the time of the issue of the temporary restraining order herein, was rightful, and all of the excavation, blasting and general and other work incidental thereto were also rightful and lawful. As I am informed and believe, and as in substance appears by the complainant's bill of complaint, the complainant learned in March last of the position of the easterly tunnel section of which she now complains, and since that time a very large amount of construction work has been done by the contractor and sub-contractor upon such easterly tunnel section proceeding in pursuance of the contract of 21st February, 1900, between the defendant The City of New York and John B. McDonald. The City of New York has for such work done since March, 1902, paid out a large amount of money. It has made such payments for the large amount of work done during the month of May last, and also a large amount of money for the amount of work done during June last.

99

The allegation of the complainant's bill that each of the defendants is a resident of the southern district of New York is not true. The defendant Edward M. Grout and myself are, and for many years have been, residents of the borough of Brooklyn, in the city of New York, and of the eastern district of New York.

A. E. ORR.

Sworn to before me this 6th day of August, 1902.

[SEAL.]

HERBERT FRAZIER,
Notary Public, N. Y. Co.

This indenture, made the eleventh day of July, in the year one thousand eight hundred and eighty-four, between Collis P. Huntington, of the city, county and State of New York, widower, of the first part, and Belle D. Worsham, of said city, county and State of New York, of the second part,

Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, and other good and valuable considerations, the receipt whereof is hereby acknowledged hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to her heirs and assigns forever, all the certain lots, pieces or parcels of land in the city of New York, with the buildings and improvements thereon, hereinafter described, viz.:

100 First. All that certain lot, piece or parcel of land with the improvements thereon, situate on the easterly side of Park (or Fourth) avenue, bounded and described as follows, viz.: Beginning at a point formed by the intersection of the southerly line of Thirty-eighth street with the easterly line of Park (or Fourth) avenue; running thence easterly along the southerly line of Thirty-eighth street, eighty feet; thence southerly, parallel with Park (or Fourth) avenue, twenty-five feet; thence westerly, parallel with Thirty-eighth street (and part of the way through the centre of a party wall) eighty feet to the easterly line of Park (or Fourth) avenue; thence northerly along the easterly line of said Park (or Fourth) avenue, twenty-five feet to the point or place of beginning, being the same premises conveyed by Matthew Byrnes and Jane, his wife, to Elizabeth S. Huntington, by deed dated October 15th, 1867, and recorded in the office of the register of the city and county of New York in Liber 1033 of Conveyances, page 188.

Second. All that certain lot, piece or parcel of land, with the dwelling house thereon, known as number 63 (sixty-three) Park (or Fourth) avenue, in the said city, county and State of New York, commencing at a point distant twenty-five feet southerly from the southeasterly corner of said Park (or Fourth) avenue and Thirty-eighth street; running thence easterly eighty feet (part of the way through the centre of a party wall) and parallel with Thirty-eighth street; thence southerly twenty-four feet seven inches parallel with Park (or Fourth) avenue; thence westerly parallel with Thirty-eighth street (and part of the way through the centre of another party wall) eighty feet to the easterly line of said Park (or Fourth) avenue; thence northerly along the said easterly line of Park (or Fourth) avenue twenty-four feet seven inches to the point or place of beginning; being the same premises conveyed by Michael L. Doyle and Anna Maria, his wife, to Elizabeth S. Huntington by deed dated July 31st, 1877, and recorded in the office of the register of
101 the city and county of New York in Liber 1409 of Conveyances, page 331.

Subject, nevertheless, to the covenants and restrictions as to buildings contained in the deed executed by Matthew Byrnes and wife to Susan E. Kerr, bearing date the second day of January, 1867, and recorded in the said office of the register of the said city and county of New York, in Liber 987 of Conveyances, page 648, on the twenty-fourth day of January, 1867, at fifteen minutes past ten o'clock in the forenoon.

Third. All that certain lot, piece or parcel of land, situate, lying and being in the city of New York, bounded and described as follows: Beginning at a point on the southerly side of Thirty-eighth street, distant one hundred feet westerly from the southwesterly corner of Thirty-eighth street and Lexington avenue, running thence southerly and parallel with Lexington avenue, ninety-eight feet and nine inches; thence westerly and parallel with Thirty-eighth street, twenty-four feet and ten inches; thence northerly and parallel with Lexington avenue, ninety-eight feet and nine inches to the southerly side of Thirty-eighth street; and thence easterly along the southerly side of Thirty-eighth street, twenty-four feet and ten inches to the place of beginning; being the same premises conveyed to Elizabeth S. Huntington by deed from Philip Embury, as trustee for Helen Embury, in which Abraham Embury also united, dated August 26th, 1868, and recorded in the office of the register of the city and county of New York, in Liber 1063 of Conveyances, page 453. But subject to the restrictions and covenants against nuisances as fully set forth in a certain indenture between Harriet R. Ogden and other owners of property on Murray hill, and duly recorded in the register's office of the city and county of New York, in Liber 485 of Conveyances, page 594.

Fourth. All that lot, piece or parcel of land and the buildings thereon, situate, lying and being in the twenty-first ward of
102 the city of New York on the southerly side of Thirty-eighth street between Lexington and Park (or Fourth) avenues, and bounded and described as follows: Beginning at a point on the said southerly side of Thirty-eighth street distant one hundred and twenty-four feet and ten inches (124 feet, 10 inches) westerly from the corner formed by the intersection of the westerly line of Lexington avenue and the southerly line of Thirty-eighth street, and running thence southerly and parallel with Lexington avenue, ninety-eight feet and nine inches (98 ft. 9 in.); thence westerly and parallel with Thirty-eighth street, fourteen feet and eight inches (14 ft. 8 in.); thence northerly parallel again with Lexington avenue and part way through a party wall, ninety-eight feet and nine inches (98 ft. 9 in.), to the southerly line of Thirty-eighth street; and thence easterly along the said southerly line of Thirty-eighth street fourteen feet and eight inches (14 ft. 8 in.) to the point or place of beginning; being the same premises conveyed to the party of the first part by deed from Mary Gilbert White and Leonard D. White, her husband, dated June 11th, 1881, and recorded in the office of the register of the city and county of New York in Liber 1611 of Conveyances, page 1.

Subject, nevertheless, to the covenants that the lands between the southerly line of Thirty-eighth street and a line parallel thereto and five feet southerly therefrom shall forever remain an open space or court, contained in a certain agreement between Harriet R. Ogden and others and L. M. Hoffman and wife and recorded in Liber of Conveyances 485, page 593.

And also subject to the covenants as to buildings and nuisances contained in a certain agreement between the said last named parties and recorded in Liber of Conveyances 485, page 594.

And also subject to the covenants as to nuisances contained in a certain deed executed by Susan Ogden and others to William F. Otis and recorded in Liber of Conveyances 341, page 307.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders,
103 rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part and her heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

C. P. HUNTINGTON. [L. S.]

Sealed and delivered in the presence of:
J. F. C. GROW.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this eleventh day of July, in the year of our Lord, one thousand eight hundred and eighty-four, before me personally came Collis P. Huntington, to me known and to me known to be the individual described in and who executed the foregoing conveyance, who acknowledged to me that he executed the same.

J. F. C. GROW,
[L. S.] *Notary Public* (81), *New York County.*

Recorded preceding at request, Charles H. Tweed, July 17th, 1884, at twelve o'clock and twelve minutes p. m.

Witness my hand.

JOHN REILLY, *Register.*

104 NEW YORK, *Aug. 4th*, 1902.

I hereby certify that the foregoing is a true and complete copy of the deed recorded in the office of the register of the city and county

of New York in Liber 1809 of Conveyances, pages 269 to 273, and the whole thereof.

[SEAL.] WM. J. WILSON,
Notary Public, No. 158, N. Y. County.

Register's office, county of New York, State of New York.

I, John H. J. Ronner, register of the said county, have compared the annexed copy with an instrument recorded in this office, on the 17th day of July, A. D. 1884, at 12 o'clock, 12 mins. p. m., in Liber 1809 of Conveyances at page 269, and certify the same to be a correct transcript therefrom, and of the whole of said instrument.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, this 6th day of August, 1902.

[SEAL.] JOHN H. J. RONNER, *Register.*

(Endorsed:) United States circuit court, southern district of New York.—Arabella D. Huntington, plaintiff against The City of New York, *et al.* defendants.—Affidavit of A. E. Orr.—Boardman, Platt & Soley, Parsons, Shepard & Ogden, appearing specially as solicitors for defendants for the purposes of this motion only.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

105 Circuit Court of the United States in and for the Southern District of New York.

ARABELLA D. HUNTINGTON, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald, May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, and The Rapid Transit Subway Construction Company, Defendants.
} In Equity. No. —.

STATE OF NEW YORK, }
County of New York, } *ss.:*

William Barclay Parsons, being duly sworn, says:

I am the chief engineer of the Board of Rapid Transit Railroad Commissioners for the City of New York, which I hereinafter call the rapid transit board. I was appointed to be such chief engineer in the year 1894. Prior to that time I was deputy chief

engineer of the rapid transit commission of 1891, and previous to that had been connected in various engineering capacities with three rapid transit companies projecting lines in the city of New York. I have, besides, had a large and general experience in engineering, including railroad construction, bridge construction, mining engineering and in other departments of the engineering
106 profession. Since I have been chief engineer I have made a careful study of the various rapid transit systems of other parts of the world, having made several visits to Europe for that purpose.

In June last I was requested by Alexander E. Orr, the president of the rapid transit board, to make to that board a full statement of the facts related to the construction of the easterly tunnel section under Park avenue, of which the complaint in this suit complains. I made such report to the rapid transit board at its meeting held on the 25th day of June, 1902. The matters stated in such report, so far as they are facts, are within my own knowledge and are true, and, so far as they are opinion, correctly state my opinion, and are stated as the result of my professional knowledge and experience, and more especially my long and very thorough knowledge of the problem of rapid transit construction under Park avenue. Such report is as follows

Hon. Alexander E. Orr, president Board of Rapid Transit Railroad Commissioners.

SIR: Pursuant to your instructions I hereby respectfully report upon the matters relating to the rapid transit tunnel under Park avenue. That portion of the rapid transit tunnel is nearing completion. The mode of construction which has been followed and is now being followed is shown upon the drawings submitted herewith entitled "Report upon the Park Avenue tunnel, 25th June, 1902, A, B, C, D and E." If due regard be had to proper connection of the four tracks under Park avenue with the yard and
107 tracks of the Grand Central station as required by the routes and general plan, or if due regard be had to the divergence from Park avenue of the East Side Rapid Transit line which the board has considered to be inevitable and of the building of which it would seem to be plain that public convenience will not permit long delay,—then the mode of construction which has been followed is, in my opinion, and beyond any question whatever, the best, the most practicable, the safest and the most economical. Indeed, it may be said without exaggeration that it is the only admissible or proper mode of construction.

I directed the mode of construction including the location of the easterly tunnel section of which complaint is made by Mr. Charles T. Barney in his suit just begun. My direction was given with the entire approval and consent of the chief engineer of the contractor, Mr. McDonald, who is also the chief engineer of the Rapid Transit Subway Construction Company.

At the time of our negotiations with the New York Central Rail-

road Company, late in the year 1900, I was asked to prepare plans for the necessary tracks for the connection with the yard and tracks of the Grand Central station. I prepared such plans upon which the tunnel sections on Park avenue were separated so as to permit three inside depressed tracks running into the Grand Central station and avoiding a crossing at grade. This plan placed the easterly tunnel section as it is now building. After the negotiations were temporarily suspended I informally reported to the board my intention to build the easterly tunnel section as it is now building
108 in order that work should not be done which would have to be torn out when the connection with the Grand Central station should be made. I understood that the board approved of that mode of construction on Park avenue. My directions were given without any notice to the board or consultation with it. I believed and assumed that so long as the tunnel and its various sections were kept within the central part of the street bounded on each side by a line parallel with and five feet distant from the side, the precise location was a mere matter of engineering to be determined by myself as the expert in chief for the rapid transit board with due regard to all the various requirements of the problem.

The routes and general plan contain a drawing for a part of the route under Park avenue showing three tunnels or sections of tunnel with a tunnel width out to out of at least 65 feet. A cross-section of this plan is annexed to this report as Exhibit A. The written description contained in the general plan, describing the construction for the part of the route in question, permitted a width of 65 feet in the clear. Of the three tunnel sections, the centre one was originally intended to contain two tracks, and was located beneath the Metropolitan tunnel, while the outer ones were originally intended to contain one local track each. But this was tentative or illustrative only, and was not intended to limit the engineer's choice of the most eligible location so long as the structure did not reach within five (5) feet of the house line on either side, and
109 as long as the aggregate widths of the tunnel sections in the clear did not exceed sixty-five (65) feet. When the time came to prepare the contract drawings, it was decided to build two instead of three tunnel sections, each section to contain two tracks, and each to have a width in the clear of 24 feet, and a total over all width of 27 feet each, or a total occupation of street of 54 feet. It was proposed to separate these sections by a core of rock and masonry of 17 feet in width This intermediate space could have been utilized for any purpose to which subsurface space is put, such as an additional subway track, or a double-decking of the Metropolitan tunnel, or the laying of a sewer, gas or water main or similar structure. A cross-section of the design is attached to this report as Exhibit B.

The reason for making the change in detail from that shown on Exhibit A to that shown on Exhibit B was that the latter form of construction was a safer one than that proposed by the former. The general plan provided as follows:

"This route shall also include suitable tracks and connections "from the portions of the route near the corner of Park avenue and "42nd street to the yard and tracks of the Grand Central station. "All of the tracks and connections last mentioned shall be under "Park avenue and 42nd street and private property."

The general plan also provided:

"The tracks shall be placed under the central portion of the street, "except that no tunnel shall, except at stations, station approaches, "curves and at places of access to subsurface structures, be within a "distance of five feet of the exterior line or side of the street."

110 The other junctions of the tunnel at city hall and 104th street were arranged, as shown by the contract drawings, to avoid any grade crossing by depressing the crossing tracks; for it was recognized that grade crossings would destroy the operating efficiency of the road.

When the working studies for the junction were prepared, it was found that, practically, such junction, to secure the proper result, must be arranged by depressing three tracks beneath the northbound local track and both express tracks, and then by gradually elevating them so as to form a junction with the main line at points between 37th and 35th streets. Under this arrangement a grade-crossingless junction was effected with four tracks. This arrangement is shown in Exhibit C.

The space per track for standard work is 12′ 6″, or 37′ 6″ for the three tracks. If a four-track junction were to be provided the space of 44 feet between the inside of the inner walls of the two tunnel sections to be first constructed (that is to say, the easterly section for the two northbound tracks and the westerly section for the two southbound tracks) must be sufficient to permit the removal of such inner walls whenever the construction of the intermediate tracks should begin; and to replace the same with columns. Besides, a certain amount of additional space above the normal space of 12′ 6″ for tracks would be required to provide

111 for the extra clearance at the curves where each track curves in to its connecting track. When, therefore, the work was actually laid out and the final location was made upon the ground, the westerly tunnel section was located substantially as shown on the illustrative contract drawing, namely, parallel to the axis of the street and distant therefrom 20′ 6″; and the easterly section was located at an angle to the axis of the street with its centre line distant from the centre line of the street 21 feet at 34th street, and then diverging so as to bring it 47′ 6″ from the centre line of the street at about 37th street. Without increasing the width overall it was also decided to make each tunnel 25 feet wide in the clear, being the same width as the rest of the two-track structure. These dimensions left exactly 40 feet in the clear between the outside faces of the inner walls of the two tunnel sections. Two cross-sections, one taken at 34th street, where the two tunnel sections are at a minimum distance apart; and one taken between 37th and 41st streets, where the two tunnels are at the maximum distance apart, are attached

hereto as Exhibits D and E showing the connection between the east side line and the west side line, and the arrangement of the tracks. It is, of course, a physical impossibility to join tracks except with diverging curvature, and with a reasonable gradient for the depressed tracks to rise to the same level as tracks overhead. These requirements bring the point of junction south to the neighborhood of 36th street or as shown in Exhibit C. You will
112 also see by Exhibit C that the inner face of the wall is ten feet from the building line; and that the wall itself is about 18 inches thick, so that the back of the wall will be 8′ 6″ from the building line, except for about fifty feet where the recent land slide occurred, and where there is a wall four feet thick being constructed. Even at this point the back of the wall will be six feet from the building line, so that the provision of the general plan that the tunnel shall not approach within five feet of the building line has been followed.

I am informed that the plaintiff, Mr. Barney, in this suit which has been brought, asks that there be undone what has been done in the way of construction of the easterly tunnel section. I regard this as being impossible unless at a cost of time, money, hardship and expense on the part of the public and on the part of all interested simply unendurable to be contemplated. At least seventy-five (75) per cent. of the excavation for such easterly section of the tunnel has been completed. The total work already done on the easterly sections has cost at least four hundred and fifteen thousand dollars ($415,000), all of which, except twenty-seven thousand dollars ($27,000) has been paid by the city to the contractors. The total expense of completing such tunnel sections ready for operation will not exceed two hundred and twenty thousand dollars ($220,000).
113 The elimination of the easterly tunnel section as now constructed and a substitution for it of a new easterly section set further to the west, would be inconsistent with the routes and general plan in that it would prevent proper connections with the yard and tracks of the Grand Central station. Besides that it would not be safe to leave the present tunnel section in its existing condition, because such an unventilated space might, in the course of time, become filled with gas, and explosion would undoubtedly result. For the same reason it would not be safe to fill it with sand or broken stone, the interstices of which might be filled with gas. The only safe thing to do, therefore, if it must not be completed, would be to fill it with concrete. Such expense would not, in my opinion, be less than two hundred thousand dollars.

The expense of constructing the new tunnel section up to a point corresponding to that reached by the present easterly tunnel section, would be about four hundred thousand dollars; and the time necessarily occupied in constructing the same to that point would be at least eighteen months. During such further time of construction the proprietors of Park avenue would be subjected to annoyance like that to which they have been subjected during the past two years. If this were to be done every practicable precaution known

to the engineering art would be taken to avoid accident or injury; but it is simply impossible for an engineer to give any promise that so difficult and serious a piece of work could be carried through without any accident.

114 In conclusion I beg leave to urge upon your serious attention the great risk that would be taken by stopping the work through an injunction for even a short time. On the east tunnel section the masonry lining has been completed up to 37th street from the south, and to 39th street from the north. The rock in the intermediate portion is partly supported by the debris from the land slide and partly by timber. This rock we now know to be, at this point, an unsafe and treacherous material, and one which decomposes on exposure. The risk, therefore, of allowing this ground to stand without constructing the masonry lining as rapidly as possible as we are now doing is a responsibility which I cannot accept.

The payments heretofore made to the contractor have included payments for excavation, steel and masonry for the east tunnel section between 34th and 42nd streets to the amount of about four hundred and fifteen thousand dollars.

The payments on account thereof have been in several installments. Two of such installments being for large sums of money have been made since the 21st day of March, 1902.

WM. BARCLAY PARSONS,
Chief Engineer.

115 All, or nearly all of the work thus done upon such easterly tunnel section will have been wasted if it shall not be completed in front of the premises of the complainant. If the court should require that such easterly tunnel section be there placed materially to the west of the place in which it is now being constructed, then the work upon the section will have to be done completely anew. And, besides there would be incurred the large expense of filling up or otherwise using or disposing of the easterly tunnel section as now constructed.

The further suspension of work upon such section in front of complainant's premises will be most disasterous and involve a very considerable danger. Such easterly tunnel section proceeding from the south is completely excavated and the arch of solid and permanent mason work completed to a point about one hundred and fifty (150) feet south of the line formed by the construction of the southerly boundary of the complainant's premises across Park avenue. From such point to within about five (5) feet of complainant's line, the excavation for such easterly tunnel section is nearly entirely completed and the solid and permanent mason work for the support of the arch largely in place. Proceeding from the north southerly the excavation is completed and the mason work arch being put in place to the middle line of Thirty-ninth street thence to the line formed by the continuation across Park avenue of the northeriy line of complainant's premises, being a distance of about two hundred and

ninety feet, the excavation has been in large part completed.
116 In front of the complainant's premises the excavation of the easterly tunnel section is one-half finished, as is shown by a vertical cross-section taken there, which is correctly represented upon a drawing, Exhibit F, hereto annexed entitled "63–65 Park Ave., showing relation to present excavation and proposed tunnel." The scale of such map, Exhibit F, is five (5) feet to one (1) inch.

Since the preliminary restraining order was issued herein work has been suspended in front of the complainant's premises, the work at the time being in the condition shown by the drawing Exhibit F. The roof of the excavation is now, and must, during the operation of such restraining order, be supported by timber uprights placed there only for temporary purposes. It is neither proper nor safe to delay longer the secure completion of the masonry work of the tunnel. When that shall have been put in place that portion of the tunnel, and of the street above it, and the abutting property to the east, including the complainant's premises, will be entirely secure. They will not be entirely secure until that time.

The City of New York has already invested upwards of nineteen million dollars in the rapid transit railroad described in the complainant's bill. The construction of a new easterly tunnel section on Park avenue to the extent which would be made necessary in case the place of such section were changed in front of complainant's premises as she proposes would require at least eighteen months
and would delay the commencement of operation of the
117 rapid transit railroad by as much as twelve months.

The complainant's premises as enclosed are eighty (80) feet deep from the easterly side of Park avenue, as such side now exists with the width of the avenue one hundred and forty feet.

Since the 25th day of March, 1902, a large amount of work has been done upon the easterly tunnel section objected to by the complainant herein, and at a large expense to the City of New York.

WM. BARCLAY PARSONS.

Sworn to before me this 6th day of August 1902.

[SEAL.] ROB'T H. HUTCHINS,
Notary Public, N. Y. Co.

(Here follow diagrams marked pp. 118, 119, 120, 121, 122, and 123.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

124 (Endorsed:) U. S. circuit court, southern district of New York.—Arabella D. Huntington, against The City of New York, *et al.*—Affidavit of William Barclay Parsons.—Boardman, Platt & Soley, 35 Wall street, N. Y. city.—Parsons, Shepard & Ogden, 111 Broadway, N. Y. city. Appearing specially as solicitors for the defendants for the purposes of this motion only.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

125 Circuit Court of the United States in and for the Southern District of New York.

ARABELLA D. HUNTINGTON, Plaintiff,
against
THE CITY OF NEW YORK ET AL., Defendants.

STATE OF NEW YORK,
County of New York, Southern District of New York, } ss.:

William Barclay Parsons, being duly sworn, says:

I have read copies of the letters addressed to Judge Lacombe by the complainant's counsel, two dated the 7th inst. and the third the 8th inst. Such counsel seriously misunderstood what I said to them at their interview with me on the 7th inst. I did not say or mean that, without reference to the restraining order, I would not continue work in front of the complainant's premises, for three weeks. I did say that, unless some weakness were developed in the excavation where the roof is now supported by timber, I should not recommence work for about that period.

I am advised that the restraining order prevents any kind of work for the completion of the tunnel in front of complainant's premises, and does not allow me or the engineers or contractor in charge of the work any exercise of discretion to do work of that character in case physical conditions change, as they may at any time. In my opinion the restraining order will, in case of such change, leave the work in a situation of extreme peril. I respectfully
126 express my hope that the engineer in charge of the work may be left at liberty to act instantly in case any danger shall become apparent, and that, for the safety of all concerned, and as soon as the work can be best practically done, the permanent mason work may be put in place. Until then there will be danger. Props and supports which need daily inspection, or tunnel walls or roof which likewise need daily inspection and will be put at risk by the excavation a short distance away, are a serious menace, which, in my professional opinion, the public safety and the safety of the street and property above (including the complainant's house) require should not continue for a single unnecessary day.

I distinctly stated to complainant's counsel at my interview with them that the work in front of complainant's premises to and in-

cluding the finished permanent mason work could be completed within four weeks, if speeded as it certainly would be if any weakness were to develope. I did say that, if there were no special occasion for haste, the work would normally take about three months to complete the permanent mason work.

I also and at the same interview told the complainant's counsel that the break in the ground (the accident of the rock slip in March last) occurred immediately south of the complainant's property and that the ground immediately to the north and south of the break had undoubtedly been badly strained, and that therefore weakness in the ground immediately in front of the complainant's house was liable to develope at any time. I also told them that only
127 the week before our talk I had, on my personal investigation, discovered some rock in front of the complainant's house which had then cracked.

WM. BARCLAY PARSONS.

Sworn to before me this 11th day of August 1902.

ROBERT H. HUTCHINS,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) U. S. circuit court, southern district of N. Y.—Arabella D. Huntington against The City of New York, *et al.*—Further affidavit of William Barclay Parsons verified August 11, 1902.—Boardman, Platt & Soley, 35 Wall St. New York city.—Parsons, Shepard & Ogden, 111 Broadway, New York city.—Solicitors for Board of Rapid Transit Railroad Commissioners, appearing specially for the purposes of this motion only.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

128 United States Circuit Court, Southern District of New York.

ARABELLA D. HUNTINGTON
against
THE CITY OF NEW YORK and Others.

STATE OF NEW YORK,
Southern District of New York, } ss:

William Barclay Parsons, being duly and further sworn, says:

I am the chief engineer of the Board of Rapid Transit Railroad Commissioners, and am in general familiar with the situation on Park avenue set forth in the bill of complaint herein. The complainant's house, at the southeast corner of 38th street and Park avenue, as, during the discussion of the situation of Park avenue since the accident in March last, I have been repeatedly informed, and as I now believe, was, prior to the time of such accident, occupied as a boarding house under a lease thereof made by the complainant. I am

also informed and verily believe that, immediately after the accident, the tenant and occupants of the house removed therefrom.

Since the 25th day of March, 1902, the expense of the work done upon the easterly tunnel section objected to by the complainant
129 herein and referred to in folio 35 of the former affidavit made by me herein, and verified on the 6th day of August, 1902, is not less than one hundred and thirty thousand, four hundred and nine dollars ($130,409). Since March, 1902, the city has made payments for construction work upon said easterly tunnel section as follows: For work done during the month of March, four thousand, eight hundred and twenty dollars ($4,820.); for work done during the month of April, forty six thousand, eight hundred and eighty three dollars ($46,883.); for work done during the month of May, thirteen thousand, nine hundred and twenty dollars ($13,920.); for work done during the month of June, twenty-six thousand, five hundred and three dollars ($26,503.) The city of New York is now liable to pay, and during this month will pay, for such work done during the month of July, the sum of thirty thousand six hundred and eighty nine dollars ($30,689.); and from August 1st to August 6th, inclusive, the sum of seven thousand, five hundred and ninety-four dollars ($7,594.).

WM. BARCLAY PARSONS.

Sworn to before me this 19th day of August, 1902.

JAS. HOLLMAN,
Notary Public for Kings County, N. Y.

Certificate filed in New York county.

(Endorsed:) United States circuit court, southern district of New York.—Arabella D. Huntington against The City of New York and others.—Affidavit of Wm. Barclay Parsons, verified August 19th, 1902.—Boardman, Platt & Soley, Parsons, Shepard & Ogden, solicitors for rapid transit commissioners appearing specially for the purposes of the motion only, 111 Broadway, borough of Manhattan, New York city, N. Y.—U. S. circuit court, southern district of New York, Filed Aug. 29, 1902, John A. Shields, clerk.

130 U. S. Circuit Court, Southern District of New York.

ARABELLA D. HUNTINGTON
vs.
THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD Commissioners, and Others.

Motion for Preliminary Injunction.

LACOMBE, *Circuit Judge:*

This suit is brought to enjoin the defendants from proceeding with the construction of the so-called rapid transit railroad in front of

complainant's premises on Park avenue, southeast corner of 38th street, "until such time as the city shall have obtained the fee in said avenue;" and, in the event of the city's obtaining such fee, then from constructing such railroad otherwise than in accordance with the route and general plan heretofore approved by the local authorities and by the State court, undertaking under the statute to give consent in lieu of the consent of abutting owners.

The rapid transit act (chapter 4 of the Laws of 1891 as amended) provides that the general plan, which, with a statement of the route or routes, is to be submitted for approval, shall show not only the general mode of operation, but also "such details as to the manner of construction as may be necessary to show the extent to which any street avenue or other public place is to be encroached upon and the property abutting thereon affected." Once approved no
131 change is to be made in the plans without the further consent and authorization of the local authorities and of the abutting owners, or, in lieu thereof, of the State court.

The complainant's brief thus epitomizes the "route and general plan," which was duly approved and under which alone, under the statute, the commissioners have authority to construct. They provided that the proposed railroad should consist of four parallel tracks and should run under Park avenue; that, with certain exceptions not now material, the tracks should in all cases be placed in tunnels, and that the said tracks wherever passing over or under the street should be placed over or under the central part of the street; that, under Park avenue, the width of the tunnel should be fifty feet, with a permissible width of sixty-five feet; that the roof of the tunnel should be as near to the surface of the street as street conditions and grades would permit. Certain drawings, known as 'Drawings 1–60,' illustrative of said 'details of construction' were incorporated into the said general plan as a part thereof. According to the drawings so adopted, it appeared that, under Park avenue at the point in question, there was to be a single tunnel containing four tracks, that the center line of the said tunnel was to be under the center line of Park avenue, and that the extreme width of excavation required was to — 65 feet, or thereabouts thus bringing the exterior surface of the easterly wall of such tunnel to about 37 feet 6 inches from the building line of the houses on the east side of Park avenue." Inspection of the record shows that below the existing tunnel of the existing street railroad there were to be three tunnels, the central one
132 holding two tracks and the eastern and western tunnels one track each. They were to be located centrally and within the space of sixty-five feet above indicated. The general plan further provided as follows "The route should include suitable tracks and connections from the portion of the route near the corner of Park avenue and Forty-second street to the yard and tracks of the Grand Central station. All of the tracks and connections last mentioned shall be under Park avenue and Forty-second street and private property to be acquired. * * * "The tracks wherever

passing over or under the street shall be placed over or under the central part of the street, except that no tunnel or viaduct or any wall or part thereof under or along a street, shall, except at the stations, station approaches, curves, and at places of access to subsurface structures, as hereinafter provided, be within a distance of five feet of the exterior line or side of the street." * * *

"Adjacent tracks shall be connected by necessary and suitable switches and connections, and an additional track for siding accommodation may be constructed not to exceed in length one-quarter of a mile for each mile of roadway, but provided always that the side of the tunnel shall not, by the enlargement of the tunnel for that purpose, be brought within five feet of the exterior line or side of the street."

The work now being prosecuted at the place in question consists of two tunnels beneath the existing street railroad tunnel. The westerly tunnel is substantially in accord with the general plan as to encroachment upon the avenue and effect upon abutting property; its westerly line is but five feet west of the westerly line
133 shown in the drawing. The easterly tunnel is wholly outside of the sixty-five foot central strip there shown. Its westerly line lies east of the easterly line of the original strip and its easterly line is about seven feet from the building line of the houses on the east side of Park avenue. It encroaches on Park avenue to an extent not shown in the "details as to manner of construction" which the statute provided should be shown to local authorities and to property owners and the court in advance of adoption. That it affects abutting property to an extent greater than was shown is conclusively established by the collapse of the front walls of buildings nearly adjoining complainant's.

All parties are citizens of New York and the complainant contends that this court has jurisdiction because "the Board of Rapid Transit Commissioners has been clothed with authority by the rapid transit act to build a subway, and that, acting under such authority and in the course of constructing the tunnel, it is depriving her of property without due process of law, in contravention of the fourteenth amendment, which provides that no State "shall deprive any person of life, liberty or property without due process of law." The illegal acts complained of are stated to be: "(1) By constructing a railroad under a street, the fee in which is owned by complainant; and (2) * * * by constructing a railroad in accordance with an unauthorized route and general plan of construction and thus wrongfully depriving the complainant of her easements as an abutting property owner and usurping her consent to this unauthorized mode of construction."

134 It is quite correctly contended by complainant that the question of jurisdiction will not be summarily disposed of here. It is properly to be presented by a plea and thus decided under conditions which will permit of its review on appeal. Nevertheless upon a motion for a preliminary injunction the burden is upon the complainant to satisfy the court that there is at least a

reasonable probability of ultimate success upon the question of jurisdiction as well as upon the merits of the controversy.

As to the ownership of the fee of Park avenue at the place in question complainant's contention is based upon the proposition that the city never acquired the fee, because a proceeding duly instituted to open the avenue was never completed by entry of final order. The question thus presented need not be discussed, because, upon the papers now before the court, it is not shown that complainant owns the fee, and, that being so, it is immaterial who does own it. Long after the lines of Park avenue were established on the city map, long after proceedings to open it were instituted and apparently terminated, long after it had been regulated, graded and paved and used for years as a public thoroughfare the complainant bought her property at the corner of 38th St. The deed conveyed to her two lots Nos. 63 and 65 Park avenue described as bounded upon the west by "the easterly line of Park (or Fourth) avenue" and running 80 feet in depth along 38th street, easterly from said line. Upon her rights as abutting owner only can the complainant rely to press this application.

135 It is understood that no complaint is made or relief asked for against the centrally-located triple tunnel of the general plan as affecting her rights. If it were the long delay in applying would preclude the granting of preliminary injunctive relief.

The substantial questions here presented are as to the extent of abutting owner's rights or easements, how far they are property within the meaning of the Constitution, to what extent they are affected, and, if invaded, what is the appropriate remedy. Those points have been exhaustively discussed by both sides but they are not to be considered unless the court is reasonably satisfied that the alleged interference with complainant's rights is an interference by the State. The inhibition of the fourteenth amendment is against action by a State depriving an individual of his property. The amendment is to be liberally construed, it is not to be confined to a legislative act specifically appropriating the property of A or B to some public use. A State acts by agents and the inhibition runs against all who are in fact such agents, acting within the scope of an authority conferred upon them by the State. In Chicago Burlington & Quincy R. R. *v.* Chicago, 166 U. S. 226, it is said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts
136 in the name and for the State, and *is clothed with the State's power*, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'"

A final judgment of a State court construing a State statute so as

to make it, although apparently innocuous, actually an interference with property rights has been held to be the act of a State. So too a State law, as it leaves the legislative hands, may not be obnoxious to any challenge and yet the officers charged with the administration of that valid law may so act under it as to work an illegal trespass upon the rights of individuals. Regan *v.* Trust Co. 154 U. S. 390. But in all such cases, and many have been cited in argument, the officers have acted under authority actually conferred upon them by the statute, there has been some measure of discretion confided to them and they have abused such discretion.

Now, in the case at bar, the first question to be considered is whether the State, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel which is the thing complained of. If the legislature had merely selected the streets and avenues and left it to the commissioners to determine whereabouts therein the tunnel should be located the action of the commissioners would be the action of the State. But it did no such thing; it carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be "due process of law," all to be carried on to a conclusion which should determine upon a route and general
137 plan *a* sufficiently detailed to show the "extent to which any avenue is to be encroached upon and the property abutting thereon affected." Upon such route only, and under such plan only is any authority to construct conferred by the State on the defendants or any of them. When they depart from such plan, whatever trespass they may commit upon private rights is one which the State has not only not authorized them to commit but under any fair interpretation of the rapid transit act has forbidden them to commit.

If this court were persuaded to assent to the contention of defendants that this easterly tunnel is within the description in the approved route and general plan, as a mere "connection" or "siding" or what not, then it would take jurisdiction, because the action of commissioners, engineer, and contractors being in conformity to the general plan, which the legislature had provided for and sanctioned, would be action by persons acting under State authority, and thus constituted agents of the State to contravene the provisions of the constitutional amendment. But a different conclusion has been reached.

It seems unnecessary to discuss this branch of the case at length, for the reason that the precise point has been considered in a decision handed down this week in a similar cause pending in the State court. This court entirely concurs in the reasoning and in the conclusion, most tersely and forcibly expressed in the following excerpt from the opinion in Barney *v.* Rapid Transit Commissioners:

"These necessary details the 'routes and general plan' under-
. . took to show for the advisement of all persons interested,
138 and in order that intelligent action might be taken by them to conserve their best interests in the subsequent proceedings for the confirmation and approval of the plan.

Taking the words used in the 'routes and general plan' with the plans or drawings to which they referred, no person could be expected to apprehend that the fixed position of the tunnel, as under the central portion of the street, was subject to such a change as would bring it for about ten blocks to a point thirty feet nearer the building or house line than was indicated, merely because 'suitable connections' were to be made near Forty-second street.

A civil engineer might have found that something was omitted or that there was a variance between the plan, which showed the means of making connections, and the specifications which mentioned the proposed connections, but a layman, for whose advisement the 'routes and general plan' had been prepared under the statute, could properly assume that, in some way best known to engineering science, these 'suitable connections' were to be made from a tunnel under the middle of the street. Certainly he could rely upon the general proposition that the scientific construction of a railway, with the necessary curves for the approach toward a given point, does not depend upon guesswork or chance, and I think, therefore, that no reasonable interpretation of the 'routes and general plan' would afford room for justifying the extraordinary change in the position of the tunnel, as constructed, from the line described in the
139 lawfully approved plan of construction as to this particular locality. * * *

"The work of building the tunnel at the point in question is prosecuted without legal authority."

The complainant therefore, has failed to persuade this court that there is reasonable probability that she will be able upon the trial to show that the State of New York by any of its instrumentalities or agents has deprived, or is threatening to deprive her of her easements as an abutting property owner; and for that reason, without examining into the extent of such easements, her application for preliminary injunction is denied.

The stay in this case is vacated—and the filing of this opinion shall be sufficient evidence of such vacation.

August 27th, 1902.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—Huntington *vs.* City of Nw York.—Opinion, Lacombe, J.—U. S. circuit court, southern district of New York, Filed Aug. 28, 1902, John A. Shields, clerk.

140 Supreme Court of the United States.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK and Others, Defendants. } No. 506, October Term, 1902.

It is hereby stipulated and agreed, by and between the parties hereto, that the clerk of the circuit court of the United States for the

southern district of New York certify and forward to the clerk of this court to be filed herein, copies of the affidavits of Alexander E. Orr, William Barclay Parsons, both verified on the 6th day of August, 1902, of William Barclay Parsons, verified the 11th day of August, 1902, and of William Barclay Parsons, verified the 19th day of August, 1902, all of which affidavits were originally made in the suit brought in the circuit court of the United States for the southern district of New York, wherein Arabella D. Huntington is complainant and the defendants herein are defendants, and were filed in the office of the clerk of that court on the 29th day of August, 1902, which said affidavits, by consent, were read by the defendants in opposition to the complainant's motion for an injunction herein; and of the opinion of the Hon. E. Henry Lacombe, United States circuit judge, filed in said suit, to which opinion reference is made in the memorandum of opinion filed herein, and that the said copies be added to and be deemed to be a part of the record filed
141 herein on the 13th day of November, 1902, with the same force and effect as though they had been originally included therein.

Dated New York, November 28th, 1902.

ARTHUR H. MASTEN,
Solicitor for Complainant.

G. L. RIVES,
Solicitor for the Defendant The City of New York and Others.

EDWARD M. SHEPARD,
Solicitor for Alex. E. Orr and Others, Comm'rs of Rapid Transit.

DE LANCEY NICOLL,
Solicitor for the Defendant John B. McDonald.

HOWLAND, MURRAY & PRENTICE,
Solicitors for Def't May L. Shaler.

(Endorsed:) Supreme Court of the United States.—Charles T. Barney against The City of New York and others.—Stipulation.—Edward M. Shepard, solicitor for the defendant, Board of Rapid Transit Railroad Commissioners and others, 26 Liberty street, borough of Manhattan, city of New York.

142 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to fifty-one inclusive, contain a true and complete transcript of the affidavits, opinion and stipulation recited in said stipulation in the cause entitled Charles T. Barney appellant, against The City of New

York, *et al.* appellees as the same remain of record and on file in my office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 2d day of December, in the year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-seventh.

JOHN A. SHIELDS, *Clerk.*

143 [Endorsed:] United States circuit court of appeals for the second circuit. Charles T. Barney appellant *vs.* The City of New York *et al.*, appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

144 [Endorsed:] File No. 18,734. Supreme Court of the United States, October term, 1902. Term No. 159. Charles T. Barney, appellant, *vs.* The City of New York *et al.* Stipulation & addition to record. Filed December 5, 1902.

145 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the United States court house in the Post office building in the county of New York on the 10th day of October, 1902.

Present: Honorable E. Henry Lacombe, circuit judge.

CHARLES T. BARNEY, Complainant,
against
THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith, and John Claflin, as Commissioners of Rapid Transit; John B. McDonald and May L. Shaler, as Administratrix of the Estate of Ira A. Shaler, Deceased, Defendants.

The complainant having moved for an injunction *pendente lite*, restraining and enjoining the said City of New York, Board of Rapid Transit Railroad Commissioners for the City of New York, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, as commissioners of rapid transit, John B. McDonald and May L. Shaler, as administratrix of the estate of Ira L. Shaler, deceased, defendants herein, and each of them, their agents and servants and all persons claiming under or through them, from excavating or blasting

146 or doing any act toward the construction or completion of a rapid transit railway in the borough of Manhattan, city of New York, under or upon Park avenue, in the easterly half thereof, in front of complainant's premises at the northeast corner of Park avenue and 38th street in the city of New York; and thereafter, the

motion upon the return of said order to show cause having, on the 10th day of October, 1902, been brought on for hearing, Mr. Arthur H. Masten appearing for complainant, and Mr. Edward M. Shepard appearing for the defendants, and due deliberation having been thereupon had,

Now, on reading and filing the said order to show cause, dated the 23rd day of August, 1902, and the papers upon which the same was granted, to wit: the bill of complaint verified the 23rd day of August, 1902, the affidavit of Anderson H. Tyson, verified the 23rd day of August, 1902, the affidavits of Forsyth Wickes, verified the 23rd day of August, 1902, submitted by the complainant in support of the motion, and on reading and filing affidavits presented by the defendants, which affidavits were originally made in the suit brought in this court wherein Arabella D. Huntington is complainant and the defendants herein are defendants, and which by consent are read in this case with like effect as if originally made herein, the same being the affidavits of Alexander E. Orr, William Barclay Parsons, Terence Farley and Edward J. Prest, all verified the 6th day of August, 1902, the affidavit of William Barclay Parsons, verified the 11th day of August, 1902, and the affidavit of William Barclay
147 Parsons, verified the 19th day of August, 1902, and after hearing counsel for the respective parties, and the complainant upon settlement of this order withdrawing objection that the question of jurisdiction can be raised only by a plea,

Ordered that this suit and the bill of complaint therein be, and they hereby are, dismissed and stricken from the docket of this court, with costs, for the reason that such suit does not really substantially involve a dispute or controversy properly within the jurisdiction of this court.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) U. S. circuit court, southern district of New York.—Charles T. Barney, vs. The City of New York and others.—Order.—Edward M. Shepard, Boardman, Platt & Soley, solicitors for Board of Rapid Transit R. R. Commissioners, 26 Liberty street, New York city. U. S. circuit court, southern district of New York, Filed Oct. 15, 1902, John A. Shields, clerk.

148 Supreme Court of the United States.

CHARLES T. BARNEY, Complainant, *against* THE CITY OF NEW YORK and Others, Defendants.	No. 506, October Term, 1902.

It is hereby stipulated and agreed by and between the parties hereto that the clerk of the circuit court of the United States for the southern district of New York certify and forward to the clerk of this court, to be filed herein, a copy of the decree entered herein on

October 15th, 1902, and that said copy be added to, and be deemed to be a part of, the record filed herein on the 13th day of November 1902, to the same force and effect as though it had been originally included therein.

Dated New York, July 16th, 1903.

ARTHUR H. MASTEN,
Solicitor for Complainant.
EDWARD M. SHEPARD,
Solicitor for Alexander E. Orr and Others, Commissioners of Rapid Transit.
HOWLAND, MURRAY & PRENTICE,
Solicitors for Defendant May L. Shaler, as Administratrix, etc.
NICOLL, ANABLE & LINDSAY,
Att'ys for Def't John B. McDonald.
GEORGE L. RIVES,
Solicitor for Def'ts The City of New York, & al.

149 [Endorsed:] Supreme Court of the United States. Charles T. Barney, complainant, against The City of New York and others defendants. Stipulation. Arthur H. Masten, solicitor for complainant, 49 Wall street, New York.

150 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to five inclusive, contain a true and complete transcript of the decree and stipulation of counsel, in the cause entitled Charles T. Barney, complainant, appellant, against The City of New York, and others, defendants, appellees, as the same remain of record and on file in my office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of July in the year of our Lord, one thousand nine hundred and three and of the Independence of the said United States the one hundred and twenty-eighth.

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States circuit court of appeals for the second circuit. Charles A. Barney appellant *vs.* The City of New York and others appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

151 [Endorsed:] File No. 18734. Supreme Court U. S. October term, 1903. Term No. 159. Chas. T. Barney, appellant, *vs.* The City of New York *et al.* Stipulation of counsel & addition to record. Filed July 21", 1903.

Endorsed on cover: File No. 18734. S. New York, C. C. U. S. Term No. 159. Charles T. Barney, appellant, *vs.* The City of New York, The Board of Rapid Transit Railroad Commissioners for the City of New York, *et al.* Filed November 13, 1902.